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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 541

JAMES P. McGRANERY, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

PAUL WM. VORT, ERNEST NAUEN, AND PAUL WM. VORT AND JULIAN H. BASCH, AS TRUSTEES U/W OF FRED BASCH, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of James P. McGranery, Attorney General, as successor to the Alien Property Custodian, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on October 13, 1952.

OPINIONS BELOW

The opinion of the District Court filed on April 11, 1951 (R. 75-86) * is reported in 99 F. Supp. 57.

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* References to the three-volume blue covered Joint Appendix will be designated "R."; those to the Transcript of Record (brown cover), containing the complete Markham testimony, as "T. R.".

The supplemental opinion filed on May 1, 1951 (R. 86-87) is reported at 108 F. Supp. 263. The *per curiam* opinion of the Court of Appeals (R. 1302) is reported at 199 F. 2d 782.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1952 (R. 1304). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In 1939, Fred Basch and respondents Vort and Nauen conspired with other Americans and with a German partnership to "cloak" or conceal the ownership by the Germans of 375 shares of stock in an American corporation. In 1943 and 1947, respondents Vort and Nauen purported to purchase for value and for their own account some of the "cloaked" shares from other parties to the conspiracy. There was no showing that the purported sellers had authority to make the sale, and no license for the transaction was obtained under the "freezing" regulations. Before any purchases were made in 1943, all the parties to the conspiracy filed affidavits and had representations made on their behalf to the Treasury Department and to the Office of Alien Property Custodian that they were bona fide owners of the stock and that there was no German ownership or interest in it. They were then orally assured by the then Deputy Alien Property Custodian that he did not object to the 1943 sale, and that if it was later

determined that the shares were German-owned, he would vest the proceeds of the sale and not the shares. The 1947 sales were consummated without knowledge of them by the Government. The Attorney General, as successor to the Alien Property Custodian, subsequently vested under the Trading with the Enemy Act all the stock that had been "cloaked" in 1939, including the shares which were sold in 1943 and 1947. The present suit is under Section 9(a) of the Trading with the Enemy Act for return of the vested shares. The courts below, although finding a conspiracy to "cloak", as stated above, have held that the shares sold in 1943 and 1947 must be returned.

The questions presented are:

1. Whether the Attorney General is bound with respect to the shares purchased in 1943 and 1947 by the oral assurance given by the former Deputy Custodian in 1943, so that respondents Vort and Nauen may, by reason of that assurance, recover the shares.

2. Whether, assuming that the Attorney General could ever be bound by such an assurance, the present assurance should be disregarded because induced by fraudulent misrepresentations.

3. Whether, the Attorney General having recovered from the respondents by counterclaims the dividends which respondents received on the shares they themselves took as "cloaks" in 1939, the respondents may set off against his recovery the amount by which the receipt of such dividends in-

creased their income tax payments, when those payments were a necessary incident of the "cloaking" scheme in which respondents were engaged.

STATUTES INVOLVED

The relevant provisions of the Trading with the Enemy Act, as amended, and of the Executive Orders are set forth in the Appendix, *infra*, pp. 28-35.

STATEMENT

On December 22, 1948, the Attorney General vested, under the Trading with the Enemy Act, 1442 shares of Herman Basch & Co., Inc., a New Jersey corporation, as the property of Thorer & Co., a German partnership and an enemy national. Of those 1442 shares, 518 stood in the name of respondent Vort, 136 stood in the name of respondent Nauen, and 156 stood in the name of the respondents Vort and Julian Basch, as trustees of the estate of one Fred Basch, who had died in 1943 (R. 5-8). On September 21, 1949, the Attorney General vested the dividends paid on the vested shares from January 1, 1939, to December 31, 1948 (R. 27-29).

The respondents brought suit under Section 9(a) of the Trading with the Enemy Act to recover the shares vested from them. The district court found[1] that at a February 1939 conference at Trenton, New Jersey, the respondents Vort and Nauen, and Fred Basch, agreed with others and

[1] The court's findings are embodied in its opinion (R. 75-86). For purposes of this petition, we accept all of those findings; we here present only questions of law.

with representatives of Thorer & Co., a German partnership, to conceal or "cloak" (R. 81) the continued ownership by the German partnership of 375 shares of the 500 shares of Althor, Inc., a New York corporation, which then held title to the 2000 outstanding shares of Herman Basch & Co., Inc., a New Jersey corporation (R. 79-82).[2] As a part of the basic conspiracy, Thorer & Co. took a repurchase option on the 375 shares, and the Americans to whom those shares were transferred, including the respondents Vort and Nauen and also Fred Basch, executed cross-options among themselves, so that no sales could be made outside of the group. (R. 80) The district court found "that in fact the money purported to have been paid to the Germans was really their money," (R. 80-81), that the plaintiffs were "cognizant to a large extent of the plan to cloak" and willing "to join in the conspiracy and assist in protecting the German interest" (R. 81), and that "[I]t is clear that the whole Trenton transaction was a sham and that the Germans still retained the control of the [Althor] company" (R. 82).

In December of 1940, the option to Thorer & Co. was purportedly cancelled, upon a payment of $63,000 by the Althor stockholders to Thorer & Co. Concerning this cancellation, the district court found that "a dividend of $64,000 was declared [by Althor] to make this payment," and "I am

[2] As part of the same agreement, the Germans sold outright to Vort 50 shares of Althor, 50 to Fred Basch, and 25 to Nauen (R. 80).

satisfied that the cancellation of the options was fictitious and that the Germans still remained in control" (R. 83). Finally, in August of 1941, the cross-options among the stockholders were cancelled, the cancellation being "pre-dated to January 1941" (R. 83, 84). This cancellation, the court found, "was gone through evidently to prevent the seizure of the [Althor] stock by the United States" (R. 83), and the pre-dating of the cancellation "was a continuation of the fraudulent concealment of the German interests, when the stockholders were compelled to file affidavits that they were the true owners of the [Althor] stock standing in their names" (R. 84).[3]

In 1941, after Executive Order No. 8389—the "freezing" order—had been amended to cover German assets, each of the Althor stockholders, including the respondents Vort and Nauen and Fred Basch, filed reports on Form TFR-300 with the Treasury Department stating that they held all their Althor shares free and clear, with no interest or claim in any foreign national. See *e.g.*, TFR-300 filed by respondent Nauen (R. 1203-1207). In 1942 and 1943, they similarly caused representations to be made to the Treasury Department and to the Alien Property Custodian that they owned their Althor shares free and clear and that there was no other interest therein. For example, respondent

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[3] The court noted that certain "freezing controls" went into effect in the Spring of 1940 and that the "conspirators were evidently concerned about the extension" of them to German property (R. 82).

Nauen filed an affidavit on June 29, 1942, in which he stated (R. 1199):

> I have no understanding or agreement with anyone, directly or indirectly in connection with said stock, and no one but myself has any interest in said shares. The entire interest in said shares, both actual and beneficial, is in myself.

Mr. Myron Cowen,[4] who was employed as attorney to represent the Althor company and its shareholders, specifically directed the Alien Property Custodian's attention to these representations in a letter dated January 30, 1943 (R. 1011-1012):

> Each shareholder has heretofore presented affidavits to the Treasury Department, certifying that they own their shares in their own right, and that no one else has any interest of any kind, either directly or indirectly in such shares. Even though we know such to be the fact, it has been thought that, because of the former business association of some of the stockholders with the former German owners, a sale of a substantial part of their shares would be looked upon with favor. While none of the stockholders are desirous of disposing of their shares, they are willing to place the interests of the company above their own personal interests, if by so doing the company is permitted to operate free of any governmental

[4] There is no contention by the Government that Mr. Cowen was cognizant of the conspiracy; or that either he or Mr. Markham acted otherwise than in good faith.

supervision or restriction not common to all American corporations.

On the facts found by the district court, these representations were false.

Several of the persons who had taken some of the 375 Althor shares in 1939 had been attorneys for the German Thorer & Co. and one was a cousin of one of the leading partners in Thorer & Co. (R. 84). Because of those facts, the Treasury and the Custodian were investigating the ownership of the Althor shares in 1942 and 1943. The suggestion was then made [5] that the attorneys and Theodore Koch should sell some of their shares to the respondents Vort and Nauen and to Curt Mahler (T. R. 6-7).[6] The stated reasons for this proposed sale are indicated in the letter of Mr. Cowen, quoted above.

Mr. Cowen discussed this proposal with Mr. James E. Markham, the Deputy Alien Property Custodian. The sole evidence, other than hearsay,

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[5] The record does not indicate who made the suggestion for a sale. Although respondents urged below that the sale was made upon the suggestion of the Custodian, the district court did not so find, but found merely that Mr. Markham "did not object" to it. (R. 84). Mr. Markham's testimony was that during discussions with Mr. Cowen "a suggestion was made" for a sale; that he advised Mr. Cowen "that he ought to write a letter to the office telling what he proposed to do" (T. R. 7); and that he told him that he "had no objection" to a sale. (T. R. 8).

[6] The attorneys and Koch made up part of what was termed the "investment group" of Althor stockholders (R. 84).

Mahler was also a member of the "investment group" (R. 108, 109, 275). There are pending in the District Court for the Southern District of New York, suits brought by him and his wife under Section 9(a) of the Act to recover shares vested from them.

as to Mr. Markham's attitude toward the 1943 sale is his own testimony in this suit (T. R. 2-65). He stated to Mr. Cowen that he did not object to the proposed sale; that, since the Althor shares had not been vested, the holders could sell and the purchasers would get a good title; and that, if the Alien Property Custodian later decided that the shares in question were German-owned, he would vest the proceeds of the sales and not the shares (T. R. 8-9). However, he testified that this assurance was made "on the information that I had at the time" (T. R. 42), which, of course, included the numerous false affidavits filed. He refused to give a letter stating that he would not vest, saying "it was not my practice to tell what I would do in the future" (T. R. 10). As to a license under "freezing" controls for the transaction, he said, "We gave them no license. They could act on their own." (T. R. 19.)

Mr. Markham made no written memorandum or other record of the assurance which he had given. He testified that he gave no information of it to his successors as Custodian [7]—Mr. Donald C. Cook, and Mr. (now Circuit Judge) David L. Bazelon. (T. R. 38, 43, 44.) [8] Apparently, the first time he

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[7] Mr. Markham became Custodian in 1944, succeeding Mr. Leo T. Crowley.

[8] Mr. Markham disclaimed any intention to bind a successor. He testified (T. R. 16):

> Q. Well, did you tell him [Mr. Cowen] that the Office would never vest the shares?
>
> A. I spoke for myself only.
>
> Q. Well, I don't think that is responsive.
>
> A. I told him while I was Alien Property Custodian that I was not going to vest the shares. That if they wanted to sell, sell them, and tell the whole story, and

told anyone about the commitment was when he told Mr. Berger, respondents' counsel, "when he [Berger] had this case" (T. R. 15).

Upon receiving this assurance from Mr. Markham, respondent Vort bought shares of Althor from George Ward and William Lancaster, who were other parties to the 1939 agreement (R. 84). Vort purchased these shares with his own money and intended to hold the shares as his own property, with the intent that he, together with respondent Nauen and Fred Basch, should control the Althor corporation (R. 85).

In 1944, Althor, Inc., was dissolved, and the 2000 shares of Herman Basch & Co., Inc., held by Althor were distributed among its stockholders, including the respondents Vort and Nauen, and the estate of Fred Basch, at the rate of 4 shares of Basch for each share of Althor (R. 24, 30, 33, 36, 38, 40).

In 1947, respondent Vort bought 118 shares of Basch from other parties to the 1939 agreement and respondent Nauen bought 40.[9] There was no evidence of any additional assurance given to respondents in 1947 or of any knowledge by the Government of the 1947 sales. Indeed by letter of November 28, 1945 (R. 1178), the respondents had been put on notice that the Government was still investigating the matter. Again, the respondents paid with their own money. (R. 85.)

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write a letter in here and tell us what they were going to do.

Q. Did you intend to bind the Office so that no succeeding Custodian could vest?

A. I only intended what the words import.

[9] Fred Basch died in January, 1943, and made no purchases subsequent to the agreement of February, 1939.

The district court held that the Attorney General was entitled to retain the vested shares that the respondents Vort and Nauen, and Fred Basch, had acquired by transfers from the Germans in 1939, but that the respondents Vort and Nauen were entitled to recover the shares they bought in 1943 and 1947 from other parties to the 1939 agreement (R. 85). It also held that the Attorney General was entitled to recover from the respondents on his counterclaims the amounts of the dividends received by Vort, Nauen, Fred Basch, and his estate,[10] from 1939 to 1948, on the 408 shares the Attorney General was held entitled to retain, but that the respondents could set off against those counterclaims the amounts by which the income taxes paid by them had been increased by reason of those dividends (R. 86-87, 93). The result was to allow a recovery to respondents Vort and Nauen of 402 shares, to allow the Attorney General to retain 408 shares, and to allow a $57,600 set-off to all of the respondents on the Attorney's General's counterclaims (R. 90-92).

Both sides appealed. The court of appeals, in a *per curiam* opinion, held that the findings and conclusions of the district court were in all respects correct, and affirmed. It held that the respondents Vort and Nauen acquired by "bona fide purchase" the shares they bought in 1943 and 1947 (R. 1302).

REASONS FOR GRANTING THE WRIT

1. The courts below have given almost conclusive effect, as limiting the power of the United States

[10] Fred Basch's estate is represented herein by its trustees, *viz.*, respondents Vort and Julian Basch.

to seize and retain enemy property, to an oral assurance, given by the Deputy Alien Property Custodian and never recorded in writing or communicated to the successor Custodians, that he would not vest these shares.[11] They have done so, moreover, despite the fact that the Deputy Custodian's action was induced by false representations made by or on behalf of the respondents as part of what the courts below have found to be a "conspiracy" (R. 81) for the "fraudulent concealment of the German interests" (R. 84).

The effect which was given to this oral assurance appears from the district court's opinion, which embodied its findings and conclusions. Those findings and conclusions were expressly approved by the court of appeals. (R. 1302). Although the district court's opinion is not wholly explicit, it seems clear on its face that it held binding on the Government what the then Deputy Alien Property Custodian, Mr. Markham, told the respondents' attorney, Mr. Cowen, in 1943, and that it was because of Mr. Markham's statements that the courts below held the respondents entitled to stand as bona fide purchasers.

The district court said with respect to the 1943 sale (R. 84-85):

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[11] We believe that a fair reading of Mr. Markham's testimony, taken as a whole, is that he was not doing anything more than stating informally how the matter of Herman Basch & Co. stood in his mind at the time. The informality with which he treated the matter certainly supports this impression. But even if he intended to make a binding commitment, such a commitment could not, for reasons which we shall develop at length, have the effect which we believe the courts below have given it.

. . . a suggestion was made that what was called the "management group", consisting of the plaintiff Vort and his associates, should buy certain of the stock held by Ward and Koch and their associates, who were members of the "investment group", so as to oust them from the controlling interest. The Alien Property Custodian did not object to this sale and so advised Mr. Cowen, who was representing the stockholders. He also told Mr. Cowen that since the stock was not vested, the parties had a right to make this sale, and that the purchasers would get a good title to the property; also, that if at any later time the Alien Property Custodian determined that this particular stock was German owned, he would vest the proceeds of the sale, rather than the stock. The plaintiffs claim that as they acted upon the suggestion and with the approval of the Alien Property Custodian, the Government is estopped from vesting the stock itself. However that may be, the transaction was an open one with full knowledge of it by the Alien Property Custodian [12] and the money used in the purchase apparently was the money of the purchasers. As the stock was to be sold there

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[12] We read, "with full knowledge of it by the Alien Property Custodian" to mean no more than that in 1943, before making the purchases, the stockholders advised the Custodian of the proposed sales (See, R. 1011-1075, 1152-1154). The stockholders never disclosed to the Custodian that the shares in question were "cloaked" for the German Thorer & Co.; to the contrary, their attorney, Mr. Cowen, "was representing that there was no German ownership in the company" (T. R. 6), and they had filed numerous affidavits making like representations (see *infra*, pp. 21-22).

> was no reason why the plaintiffs should not be the purchasers. They were seeking to get the control of the company and it does not seem that they were doing that in the interest of the Germans.

Thus the district court's opinion, although formally disclaiming any holding that the United States was estopped by Mr. Markham's statements, in effect gave almost controlling force to those statements. The scant space devoted to the 1947 sales (R. 85) is indicative that the court's conclusion as to them was deemed to flow from its conclusion as to the 1943 sales. Moreover, analysis of both transactions demonstrates that the result reached can be explained only on the ground that in some way what Mr. Markham told Mr. Cowen made the sales "bona fide" and bound the Government, for it is clear that, absent the statements made by Mr. Markham, the sales would have been invalid both as a matter of private law and under the Trading with the Enemy Act. We shall illustrate these propositions by reference to the 1943 sales, pointing out, however, that essentially the same considerations are applicable to the 1947 sales.

a. In 1943, respondent Vort bought from George Ward shares which he knew Ward held as a "cloak" for the Germans under an agreement to which Vort, as well as respondent Nauen and Fred Basch, was himself a party (R. 81-84). That is, Vort knew that Ward held only the record title and that Thorer & Co. was the beneficial owner.

Stoehr v. *Wallace,* 255 U.S. 239, 251; *Kind* v. *Clark,* 161 F. 2d 36, 46-47 (C.A. 2), certiorari denied, 332 U.S. 808. In the absence of some element of estoppel, Ward could not transfer to Vort more than he held, the bare record title. Insofar as Ward held as an agent for the Germans, he was an agent to conceal and not to sell, and authority to transfer the real ownership would not be implied. *Restatement of the Law of Agency* (1933) §§ 34, 35, 52. And, since Vort and Nauen knew when they purchased that the beneficial ownership was in Thorer & Co., that ownership would not be cut off. *Utah* v. *United States,* 284 U.S. 534, 543-544; *Scott on Trusts* (1939), § 288. As against the Germans, to whose rights the Attorney General succeeded by the vesting order, the fact that the respondents bought with intent to make the property their own, would add nothing; nor would the fact that they paid their own money make an otherwise fraudulent and inequitable transaction bona fide and valid.[13] *Milwaukee & Minnesota R. Co.* v. *Soutter* 13 Wall. 517, 546; *Lowenstein* v. *Reikes,* 60 F. 2d 933 (C.A. 2); *Commonwealth Finance Corporation* v. *McHarg,* 282 Fed. 560, 569 (C.A. 2); *Baldwin* v. *Short,* 125 N.Y. 553, 560, 26 N.E. 928. In all these circumstances there is nothing to stamp the transaction as what the Court of Ap-

[13] In no sense were the purchases "bona fide". The purchasers intended to prevent the United States from vesting property they knew to be enemy owned. Moreover, any effort by them to acquire beneficial ownership of the shares would have been a breach of faith with their German co-conspirators, for whose benefit they had agreed with the sellers to "cloak" the shares.

peals termed a "bona fide purchase". See, *Pomeroy's Equity Jurisprudence* (5th ed., 1941), § 762.

b. Under the Trading with the Enemy Act—leaving aside the assurance given by Mr. Markham—the purchases would have been equally invalid. Buying property from an enemy is "trade" with the enemy (Trading with the Enemy Act, Sec. 2(d), *infra*, p. 28) and such "trade" is unlawful. Section 3(a), *infra*, p. 28.[14] Even if Vort had believed that Ward was selling "on account of" Thorer & Co., the transaction would have been prohibited. On such a purchase, Vort could base no "right or remedy". Sec. 7(b) (*infra*, pp. 30-32). The same result follows under Executive Order No. 8389, as amended (*infra*, pp. 34-35. That order prohibits except as licensed, all "transfers" and "dealings in" evidences of ownership, such as stock certificates (see, *United States* v. *Leiner*, 143 F. 2d 298, 300 (C.A. 2)), of foreign property subject to the order. An unlicensed transfer is void. *Propper* v. *Clark*, 337 U.S. 472, 484. Indeed, even apart from statute or regulation, a sale of enemy property during wartime is ineffective against the sovereign. *Schrijver* v. *Sutherland*, 19 F. 2d 688 (C.A.D.C.).

Vort knew when he purchased from Ward that he was buying German property; therefore, unless he obtained a license, he knew that he was engaged

[14] Section 3 of the Act has been held to be still vital, except as to transactions authorized under Section 5(b) and the freezing regulations. *United States* v. *Leiner*, 143 F. 2d 298 (C.A. 2).

in a prohibited transaction.[15] No license was applied for, and no one regarded what Mr. Markham said as a license. To have applied for a license would have been to admit what the respondents were then denying, that the property was German; thus, as James Stevenson, one of the other participants in the conspiracy, testified, the question of a license did not arise (R. 268). Mr. Markham testified without contradiction, referring to Executive Order No. 8389, that he gave no license (T. R. 19) [16] and neither opinion below suggests that a license was given. For this reason also, the purchasers of the German-owned shares got nothing.[17]

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[15] We take the statement of the district court that "the shares were not blocked" in 1947 (R. 85) to be a conclusion of law based, presumably, on the fact that no specific order had been issued with respect to the shares, while such an order had been issued with respect to the accounts of the corporation in 1942 and later revoked (R. 1044-1045). But if the shares were in fact German-owned, Executive Order No. 8389 applied by its terms without the necessity of a specific order. Moreover, the removal of a specific blocking order on the corporate accounts, in order to permit the corporation to continue to operate, obviously did not have the effect of unblocking the shares so as to permit ownership of the corporation to change hands without a license.

[16] We do not question Mr. Markham's authority as Deputy Alien Property Custodian to give an oral license, had he intended to do so, which he clearly did not. A license by inadvertence would seem to raise questions of estoppel, as to which see *infra*, pp. 18-23.

[17] The interest claimed here, as in *Propper* v. *Clark*, 337 U.S. 472, is one of title adverse to the Custodian and obtained after freezing and without a license. In *Propper*, this Court held that such a claim could not stand as against the federal program. Such a title transfer does not present the considerations to which this Court alluded in *Zittman* v. *McGrath*, 341 U.S. 446, 452-459. Compare *Orvis* v. *McGranery*, No. 404, this Term.

c. Thus, apart from Mr. Markham's statements, the sales were ineffective to transfer title to these respondents. The district court's opinion, however, apparently regards these defects in respondents' title as having been swept aside by Mr. Markham's oral assurance not to vest. We do not believe that Mr. Markham intended to make a binding commitment; we think he was merely stating his present intentions. (See p. 12, n. 11 *supra*.) But in any event, in holding that what Mr. Markham said in 1943 bound the Government in this suit, we believe that the decisions below were erroneous, for the reason that Mr. Markham had no authority to bind the then Alien Property Custodian or a successor to refrain from exercising the authority to vest.

The authority to seize, or vest, enemy property is an attribute of the United States in its capacity as sovereign. *Central Trust Co.* v. *Garvan*, 254 U.S. 554, 566. The delegation of that authority to the Custodian is found in Executive Order No. 9193, as amended (*infra*, p. 35), which provides:

> The Alien Property Custodian is authorized and empowered *to take such action as he deems necessary in the national interest, including, . . . the power to . . . vest.* [Section 2; italics added.]

A power to act "in the national interest" is not to be surrendered or waived without express authority. Nothing in the Trading with the Enemy Act even hints that the Custodian or his subordinate

may waive or bargain away this power. If a successor Custodian deemed it necessary in the national interest to vest the Basch shares, it was his duty to do so.[18] In holding, in effect, that the statements of Mr. Markham were binding on the Government in this proceeding, the decisions below run counter to a long line of decisions of this Court that the United States is not to be prejudiced in its property interests by the unauthorized acts or declarations of its agents. *Federal Crop Ins. Corporation* v. *Merrill*, 332 U. S. 380, 384; *United States* v. *California*, 332 U. S. 19, 39-40; *Wickard* v. *Filburn*, 317 U. S. 111, 118; *United States* v. *Stewart*, 31 U. S. 60, 70; *Wilber Nat. Bank* v. *United States*, 294 U. S. 120; *Hart* v. *United States*, 95 U. S. 316, 318; *Whiteside* v. *United States*, 93 U. S. 247; *The Floyd Acceptances*, 7 Wall. 666, 676; *Lee* v. *Munroe and Thornton*, 7 Cr. 366, 368-369.

d. The foregoing rule is applied even where the facts were fully disclosed. *A fortiori*, the United States is not bound where the action of its agent is affected by misrepresentation or mistake of fact. It is well settled that the United States is not bound by the action of the President or of the Custodian in returning seized enemy property when the action results from mistake or fraud. *Cummings* v. *Societe Suisse pour Valeurs de Metaux*, 85 F. 2d 287, 289 (C.A.D.C.); *Societe Suisse pour Valeurs de Metaux* v. *Cummings*, 99 F. 2d 387 (C.A.D.C.), certiorari denied, 306 U. S. 631; *Rodiek* v. *United*

[18] Indeed, Mr. Markham disclaimed any intention to bind his successor, see n. 8, *supra*.

States, 117 F. 2d 588, 120 F. 2d 760 (C.A. 2), affirmed, 315 U. S. 783; *Isenberg* v. *Biddle,* 125 F. 2d 741, 743 (C.A. D.C.); *Swiss Nat. Ins. Co.* v. *Crowley,* 136 F. 2d 265 (C.A.D.C.), certiorari denied, 320 U. S. 763. A like rule would seem clearly applicable here. It is clear from the findings and from undisputed facts that Mr. Markham's statements were influenced by concealment and affirmative misrepresentation both as to the real ownership of the shares held by the sellers, Ward, Lancaster, and Koch, and as to the character and status of the purchasers, in 1943, respondent Vort and Curt Mahler. Respondents and the other Althor stockholders had two aims: to conceal the German ownership of the Althor shares to be sold by Ward, Lancaster, and Koch; and to convice the Government that the purchasers were not themselves acting for the Germans and therefore were what Mr. Markham called "appropriate purchasers" (T. R. 37-38).[19]

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[19] In 1943 Ward, Lancaster, and Koch were under some suspicion, while the "management", Vort and Nauen (Fred Basch died in January, 1943) were under no suspicion at all. Ward and Lancaster (and, probably, his associate Stevenson), were under some suspicion because they had acted as attorneys for Thorer & Co. and because they had received "fees" sufficient to finance the purchases of shares they claimed to have made in February, 1939 (T. R. 4-8, 21-22, 35-36). Koch had also received "fees" and was a relative of Paul Hollender, one of the heads of Thorer & Co. (R. 77, 79). They were also under investigation because Ward and Koch at least were connected with the companion Thorer company of Thorer & Hollender, Inc. (T. R. 4, 64). On the other hand, according to Mr. Markham, no question arose at that time as to the "management", Vort and Nauen (T. R. 36, 64), and he understood that the proposed sales meant that the people involved in Thorer & Hollender were getting out and Vort was staying in (T. R. 64). If Vort had in fact no connection with

What the district court found was that in 1939, *all* the stockholders, including the respondents as well as Ward, Lancaster, and Koch, acquired the Althor shares under the one agreement to "cloak" for the Germans. The sole difference was that Vort, for example, was "cloaking" the title to only 39 of his 89 shares, while Ward was "cloaking" all of his 95. It further found that in entering into this sale and the subsequent option cancellations of 1940 and 1941 respondents joined in the cloaking "conspiracy" (R. 81) and participated in "fraudulent concealment of the German interests." (R. 84.)

From these findings, it follows inescapably that the affidavits and statements filed by the respondents and their confederates with the Treasury and the Alien Property Custodian in 1941 and 1943 were false and intended to conceal the continuing German interests. All the stockholders acted in concert in making those affidavits and representations, they consulted about what to say, they reviewed the drafts of each other's affidavits, and they exchanged copies (R. 1138-1139, 1140-1141, 1143, 1147, 1157, 1191, 1192, 1193, 1273-1274, 1274). The affidavits represented to the Government that the Trenton transaction had been an outright and bona fide sale, and that all the stockholders held their Althor shares in their own right, with no one

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any "cloaking' scheme, then he could have been a bona fide purchaser, and Mr. Markham's statement that the purchasers would get a good title (T. R. 9) would have been correct, apart from the question of a Treasury license with which Mr. Markham did not concern himself.

else having any interest of any kind, direct or indirect. (R. 1011). The attorney-stockholders, Ward, Lancaster, and Klein, were particularly explicit to that effect (R. 1041, 1049, 1144, 1189, 1292). Respondent Nauen's affidavit makes the same point (R. 1199). That respondent Vort knew of those representations is not open to question. He testified that he asked the attorney-stockholders to give him copies of the affidavits (R. 169), and the affidavits of Ward and Lancaster were specifically mentioned (R. 169, 171).

It is also clear that Mr. Markham was influenced by these misrepresentations.[20] Mr. Markham, who was called as a witness by the respondents and who was not in this respect contradicted, testified that in 1943, "I decided to the best of my belief on the information I had at the time" (T. R. 42). That information necessarily included the affidavits, as is confirmed by the report of the Custodian's investigators approved in June 1943 (R. 1176-1178).[21] Mr. Markham testified that he read the affidavits or was told about them by his subordinates (T.R. 21). Moreover, Mr. Cowen specifically called Mr. Markham's attention to these affidavits by let-

[20] Respondents, having made false representations to the Government, have no standing to insist that reliance on those statements and on nothing else at all must be established exactly. Having set out to deceive the Government and obtained the result they desired, they should not now be heard to urge that in a proceeding some eight years later the Government failed to show that their fraud was the only proximate cause. *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238, 246.

[21] It was not until the investigation by Bliss and Orr of Koch's files in St. Paul in 1945 that more evidence was secured (T. R. 48-49, 66-67).

ter (*supra*, p. 7) and, presumably on the basis of those affidavits and statements made to him by his client, "was representing that there was no German ownership in the company." (R. 6) Mr. Markham regarded Mr. Cowen as a man whom he had reason to trust, for Mr. Cowan was a friend of, and had been introduced to him by, one of his own friends (T. R. 10, 54, 58-61).

On these facts, we believe that the decisions below permit respondents to profit by their own misrepresentations and are therefore erroneous. Equity requires that its suitors shall have acted fairly and without fraud or deceit as to the controversy in issue. *Precision Inst. Mfg. Co.* v. *Automotive M. M. Co.*, 324 U.S. 806, 814-815. See also, *Keystone Driller Co.* v. *General Excavator Co.*, 290 U.S. 240, 245; *Kitchen* v. *Rayburn*, 19 Wall. 254, 263; *Standard Oil Co.* v. *Clark*, 163 F. 2d 917, 934-935 (C.A. 2), certiorari denied, 333 U.S. 873. These considerations, at a minimum, require that a suitor in equity be not allowed to take advantage of official action induced by his own misrepresentations. See cases cited pp. 19, 20, *supra*, and *cf. Standard Oil Co.* v. *Clark*, *supra*.

2. Related considerations apply to the income tax credit which the courts below allowed to the respondents. According to the decisions below, the Custodian rightly vested 408 shares of Basch stock as German-owned.[22] From 1939 to the vesting of the shares in 1948 the respondents received in

[22] Those were the product of the 102 shares of Althor stock which respondents Vort and Nauen, with Fred Basch, took in February, 1939, as "cloaks" for the Germans.

dividends on those shares some $93,000 (R. 90-92). In 1949, the Attorney General vested the right to those dividends (R. 27-29).

As fraudulent grantees, respondents were bound to account for the income they received from the property. *Rudin* v. *Steinbugler,* 103 F. 2d 323 (C.A. 2); *Commonwealth Finance Corporation* v. *McHarg,* 282 Fed. 560 (C.A. 2). The courts below so held in allowing petitioner's counterclaims.

As against this recovery by the petitioner on his counterclaims, however, the courts below allowed to respondents, as a credit, the amount by which the receipt of the dividends on the 408 "cloaked" shares increased their income tax payments (R. 86-87).[23] In that we believe that they erred. To a successful "cloaking" of the German ownership of those shares it was absolutely necessary that the respondents should treat the shares in every way as their own. To report the taxes on those shares as income to Thorer & Co. was unthinkable; to fail to pay the taxes was to invite investigation. The taxes had to be paid and were paid as part of a scheme to circumvent the law and to conceal enemy property, and as an expense of an unlawful scheme they may not be recovered from the United States. *Pan American Co.* v. *United States,* 273 U.S. 456,

[23] It seems clear that the dividends were "income" to the respondents within the statutes. 26 U.S.C. 22(a). *Commissioner* v. *Wilcox,* 327 U.S. 404; *Rutkin* v. *United States,* 343 U.S. 130. Respondents received the dividends under a "claim of right" and were taxable thereon, even though they might be held liable later to others for what they received. *North American Oil Consolidated* v. *Burnet,* 286 U.S. 417; *United States* v. *Lewis,* 340 U.S. 590.

509; *Mammoth Oil Co.* v. *United States,* 275 U.S. 13, 55; *Standard Oil Co.* v. *Clark,* 163 F. 2d 917, 928, 934-935 (C.A. 2), certiorari denied, 333 U.S. 873. Thus in the *Standard Oil* case the Court of Appeals disallowed a claim of a plaintiff for money paid to acquire record title to certain shares, on the ground that ". . . the money advanced was just a step in misrepresenting the ownership of the stock". (*Ibid.*) The same rule is applied in the ordinary case of a fraudulent conveyance:

> Almost invariably some honest consideration is made the agency for floating a scheme of fraud against creditors, and if that may always be saved, nothing is lost by the effort and the temptation to venture it is increased. [*Baldwin* v. *Short,* 125 N.Y. 553, 560; 26 N.E. 928.] [24]

[24] By a similar line of reasoning, the Government might be held entitled to retain both the shares of stock purchased by respondents and the proceeds of the sale received by the vendors. Mr. Markham recognized that both could be vested (T. R. 22), and that was the course actually followed. The proceeds were vested by Vesting Order No. 13853, dated September 21, 1949, 14 F.R. 5855, and by settlements the vendors have relinquished any interest they might claim to such monies. The vesting, of course, concludes nothing (*Central Trust Company* v. *Garvan,* 254 U.S. 554, 567), and, as we have indicated, a bona fide purchaser for value without notice of the "cloaking" would be entitled to recover the shares, but a purchaser who knew what he was buying might be held to have taken the chance of losing both the stock and the money used as an expense of an illegal scheme. Cf. Section 16 of the Trading with the Enemy Act, which provides that "any property, funds . . . concerned" in a willful violation of the Act shall be forfeited to the United States. In an analogous situation where the Government has sued to annul land patents procured by fraud, the ordinary rule that a vendor seeking to annul a sale fraudulently induced must offer and be ready

3. The questions are important. In giving to the unrecorded oral statement of Mr. Markham the practical effect of an estoppel, the courts below departed from the settled principle, which is of vital importance in the conduct of all aspects of government, that sovereign powers may not be waived or surrendered by agents of the United States except with express statutory authority. Moreover, even assuming power in Mr. Markham to make a binding commitment, the result below does violence to another fundamental principle of government—that official action induced by fraudulent misrepresentation does not bind the government. Finally, in allowing the respondent to set off expenses—the increased tax payments—incident to the effectuation of their fraudulent scheme, the courts below appear to have departed from settled principles of equity. The principles involved in this case are of general application to all governmental activities; their vindication is of especial importance in a case involving a conspiracy with our enemies to defeat the exercise of the war powers.

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to return the consideration received has been held not to apply to suits by the United States, since the purpose of such a suit is to "enforce a public statute against those who have violated its provisions." *United States* v. *Trinidad Coal Co.*, 137 U.S. 160, 170. And see *Causey* v. *United States*, 240 U.S. 399, 402. However, this question was not presented in the district court in this case because no proceeds were collected by the Government until after trial herein. In any event, the fact that the proceeds were vested does not entitle respondents to recover the shares; at most it might require that upon remand some order be entered with respect to the proceeds.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER J. CUMMINGS, JR.,
Solicitor General.

JANUARY, 1953.

APPENDIX

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1 *et seq.:*

Sec. 2 * * * The words "to trade," as used herein, shall be deemed to mean—

* * * * *

(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

(e) To have any form of business or commercial communication or intercourse with.

Sec. 3. That it shall be unlawful—

(a) For any person in the United States, except with a license of the President, granted to such person, or to the enemy, or ally of enemy, as provided in this Act, to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy.

* * * * *

Sec. 5(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may,

through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accom-

plishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

Sec. 7(b) Nothing in this Act contained shall render valid or legal, or be construed to recognize as valid or legal, any act or transaction constituting trade with, to, from, for or on account of, or on behalf or for the benefit of an enemy performed or engaged in since the beginning of the war and prior to the passage of this Act, or any such act or transaction hereafter performed or engaged in except as authorized hereunder, which would otherwise have been or be void, illegal, or invalid at law.

No conveyance, transfer, delivery, payment, or loan of money or other property, in violation of section three hereof, made after the passage of this Act, and not under license as herein provided shall confer or create any right or remedy in respect thereof; and no person shall by virtue of any assignment, indorsement, or delivery to him of any debt, bill, note, or other obligation or chose in action by, from, or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy have any right or remedy against the debtor, obligor, or other person liable to pay, fulfill, or perform the same unless said assignment, indorsement, or delivery was made prior to the beginning of the war or shall be made under license as herein provided, or unless, if made after the beginning of the war and prior to the date of passage of this Act, the person to whom the same was made shall prove lack of knowledge and of reasonable cause to believe on his part that the same was made by, from or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy; and any person who knowingly pays, discharges, or satisfies any such debt, note, bill, or other obligation or chose in action shall, on conviction thereof, be deemed to violate section three hereof: *Provided,* That nothing in this Act contained shall prevent the carrying out, completion, or performance of any contract, agreement, or obligation originally made with or entered into by an enemy or ally of enemy where, prior to the beginning of the war and not in contemplation thereof, the interest of such enemy or ally of enemy devolved by assignment or otherwise upon a person not an enemy or ally of enemy, and

no enemy or ally of enemy will be benefited by such carrying out, completion, or performance otherwise than by release from obligation thereunder.

* * * * *

Sec. 9(a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if

the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

Sec. 16. That whoever shall willfully violate any of the provisions of this Act or of any license,

rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act, shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisoned, or both, and any property, funds, securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, concerned in such violation shall be forfeited to the United States.

* * * * *

Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order No. 8785, June 14, 1941, 6 F. R. 2897:

Sec. 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

* * * * *

E. All transfers, withdrawals, or exportations of, or dealings in, any evidences of indebtedness

or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * *

Executive Order No. 9095, of March 11, 1942, 7 F. R. 1971, as amended by Executive Order No. 9193, of July 6, 1942, 7 F.R. 5205, and by Executive Order No. 9567, of June 8, 1945, 10 F. R. 6917:

* * * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

(a) Any business enterprise within the United States which is a national of a designated enemy country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;

* * * * *

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IN THE

Supreme Court of the United States

October Term, 1952

No. 541

JAMES P. MCGRANERY, Attorney General of the United States, as successor to the Alien Property Custodian, *Petitioner*

v.

PAUL WM. VORT, ERNEST NAUEN, and PAUL WM. VORT and JULIAN H. BASCH, as trustees u/w of FRED BASCH, deceased.

BRIEF FOR RESPONDENTS

RAOUL BERGER
Attorney for Respondents

Of Counsel:
ABE KRASH

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3 Bogert, Trusts & Trustees 408 (1946) 22
86 Cong. Rec. 20
87 Cong. Rec. ..... 19, 20, 19, App.
Hearings, House Committee on Interstate and Foreign Commerce on H. R. 4960, 65th Cong. (1917) 15
32 Op. Atty. Gen. 65 18

In The

Supreme Court of the United States

October Term, 1952

No. 541

James P. McGranery, Attorney General of the United States, as successor to the Alien Property Custodian, *Petitioner*

v.

Paul Wm. Vort, Ernest Nauen, and Paul Wm. Vort and Julian H. Basch, as trustees u/w of Fred Basch, deceased.

BRIEF FOR RESPONDENTS

Opinions Below; Jurisdiction

We concur in Petitioner's statements under said Headings. Petition, 1-2.

Questions Presented

1. Whether Petitioner is estopped to confiscate shares of stock in a domestic corporation, sold by American citizens and residents at the insistence of the government (because it suspected them of "cloaking" for Germans), from the purchasers, American citizens and residents, who bought with their own money on their own behalf,[1] after petitioner's predecessor was advised of the contem-

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[1] In his "Questions Presented," Petitioner states that respondents "*purported* to purchase for value and for their own account" (emphasis supplied throughout). Petition, 2. At p. 10 he admits

plated purchase and assured the purchasers, as he was authorized to do, that he had no objection to the purchase, that the purchasers would get good title, and that if he subsequently concluded the shares had been enemy owned he would not vest the shares but would vest only the purchase money in the hands of the vendors?

2. Whether in the absence of a "blocking" order a license was required for the purchase of property located in the United States by American citizens and residents from Americans resident in the United States.

3. Whether, assuming a license was necessary for such a purchase, the above-mentioned acts and statements constituted an implied license by Petitioner's predecessor which precludes confiscation of said shares as enemy property.

4. Whether the Trading with the Enemy Act conferred jurisdiction over purchases of property located in the United States by American citizens and residents from Americans resident in the United States.

5. Whether the Act, if construed to confer such jurisdiction, denies due process because it fails to provide for judicial review of the "freezing control" and imposes criminal penalties so severe as to deter resort to the courts.

6. Whether, assuming that dividends were received by Respondents as bare nominees for non-resident alien enemies, income taxes paid by Respondents on such dividends were properly deducted from a judgment on Petitioner's counterclaim in order to avoid unjust enrichment and an unconstitutional taking.

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that "Vort purchased these shares with his own money and intended to hold the shares as his own property * * *." Respecting the 1947 purchase, petitioner concedes that "Again, the respondents paid with their own money." *Ibid.*

Statement of the Case

Petitioner (hereinafter defendant) bases his attack on the 1943 and 1947 purchases largely on the trial court's erroneous findings that Respondents (hereinafter plaintiffs) conspired in 1939 to "cloak" German property. These findings are the subject of our Cross-Petition. The contemporary documents which refute those findings and furnish the actual facts are discussed in the Appendix to our Cross-Petition, which we ask the Court to read.

The 1943 Purchase

Throughout 1942 and early 1943, the Treasury Department, and later the Alien Property Custodian, were suspicious of some members of the 51% "investment" group in Basch Company because it included the Germans' former attorneys—Ward and Stevenson, and Koch, the cousin, of Hollender. R. 268, 307, 329-330, 383. See infra, p. 27, and Front Plate, Cross-Petition. On July 15, 1942, Ward wrote Koch,

> "Mr. Clay (Treasury [Department Official, R. 369]) has told Mr. Cowen [counsel for Basch Co., R. 114] he didn't like the set-up and would insist it be changed. Mr. C. thinks it means both a change in ownership and a change in Directors. * * * I rather judge *they want the control in the management.*" R. 1276; see also R. 1274-1275.

"Just before" the sale in February, 1943, R. 384, Ward wrote Koch an undated letter:

> "Mr. C. [Cowen] asked me to come to N. Y. for a meeting Wed. I saw him first. He told me B. [Basch] would be vested unless something was done to convince the APC [Alien Property Custodian] a certain group—either friends, attorneys or relatives of the former owners—were not holding their shares for the benefit (as they believe) of the former owners. They say they have proof their own money

> was not used to purchase the shares.[2] * * * He seemed to think if their shares (222) could be reduced below 25% mentioned in the executive order freezing Foreign Funds it might be worked out. I talked with Jim [Stevenson] who seemed to think it was necessary and *was willing if vesting could be avoided* and the value saved for the remaining shares. * * * We didn't want to give P. [Vort] control, so we worked out a plan so with Fred's [Basch] estate and Julian [Basch] he would have 250. * * * We telephoned Mr. C. to go ahead." R. 1147.

Accordingly, Cowen called on Markham, then Deputy Alien Property Custodian. Markham testified that the discussion was interwoven with Thorer & Hollender and Ward, Koch and Lancaster, R. 115, that the Basch case was under simultaneous consideration because Ward and Koch held shares in both companies. Transcript 126-127 (unprinted).[2] The Thorer and Hollender stock was vested. R. 119; cf. Transcript 155-157, 167 (unprinted). As a result of these discussions, said Markham,

> "a suggestion was made, or a modus operandi was worked out, whereby these particular individuals would sell their stock to * * * the Management Group, * * * Mr. Vort's group." R. 115.

Markham advised Cowen to write to the Office of the Custodian describing the proposed transfer to the Management Group. R. 115. Such a letter was written at Cowen's request (R. 1011, 1012) by Percus, the Basch Company accountant, under date of January 30, 1943, to L. E. Rubin of the Custodian's staff, R. 1012, 302. Attached thereto was a memorandum outlining the proposed sale by Ward, Koch, Stevenson, Lancaster and Klein,[3] and reciting that Vort would buy 98 shares. R.

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[2] Petitioner corroborates that Ward and Koch were "under some suspicion" and "investigation" at this time for this reason. Petition 20, fn. 19.

[3] Klein declined to sell, R. 377, and a re-alignment whereby Ward sold additional shares was made. See Percus to Rubin, February 11, 1943. R. 1152.

1014, and that the holdings of Ward, et al, would be reduced from 173 to 75 shares. R. 1015 Finally, Percus wrote:

> "It can be stated unequivocally that *if* any of the shares of the present stockholders should be *vested,* and this became known to the trade, the business of Herman Basch & Co., Inc., would be *ruined completely.* This would be so because almost all of the firm's customers are Jewish." R. 1015.

Cowen also wrote Rubin on January 30, 1943:

> "While *none* of the stockholders are *desirous of disposing* of their shares, they are willing to place the interests of the company above their own personal interests, if by so doing the company is permitted to operate free of any governmental supervision or restriction not common to all American corporations." R. 1011-1012.

Sometime prior to the sale on February 15, 1943, Markham advised Cowen that his office "interposed no objection to the sale."[4]

Markham testified that he told Cowen that he "had no objection to the sale," R. 116, that "since the stock was not vested they had a proper right to sell it," R. 117, that should the Custodian later determine that the particular stock to be sold "was German-owned, it would vest the proceeds of the sale rather than the stock," R. 117, and that "the purchasers would get a good title," R. 117.

It was Defendant that characterized all this as a "commitment," and Markham responded that

> "I made a commitment after I talked with my associates." R. 118. Cf. R. 134.

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[4] "Q. Is it likely that you advised Mr. Cowen, after this letter [of January 30] was written, that your office interposed no objection to the sale, prior to February 15, when the sale actually took place?

"A. Oh, definitely. That was the whole purpose of the letter." R. 140.

On cross-examination, Markham testified that he told Cowen that

> "while I was Alien Property Custodian that I was not going to vest the shares." R. 120.

He stated that Cowen

> "had the assurance that I told him he could dispose of them, that they were not going to be vested by me." R. 121.

And he regarded his decision not to vest the shares as "irrevocable," R. 134. This the court below ruled was an

> "assurance of the United States." R. 122.

And Markham said that

> "I committed the United States not to take the stock that they bought from the investment group, so-called, to the extent that what I said is a commitment." R. 124.

Markham testified that the Treasury Department "did not require a license." R. 122, and that

> "there was a determination somewhere along the line that no license was required from Treasury. * * * There was no requirement that they procure a license from the Alien Property Custodian and I don't think that there was a requirement that they procure one from the Treasury." R. 123.

He further testified that Cowen was free to sell because

> "I didn't exercise any jurisdiction over it; the Treasury hadn't exercised any jurisdiction over it." R. 131.

The sale was made by Ward, Koch, and Lancaster to the "Management group," i.e., the Vort group, on February 15, 1943. R. 139. Ward, Koch, and Stevenson testified that they sold their shares because they were told by Cowen that the government wanted them to sell. R. 268, 329-330, 383. Klein and Mahler (a purchaser) likewise testified that they understood the "suggestion"

to sell came from the government. R. 377, 307. The government threatened either to "block" the company, R. 268, or to vest the Ward-Koch shares if they did not dispose of them. R. 284, 415, 438. Ward and Koch flatly stated that they sold only because of government pressure to sell. R. 414, 438. Koch would not have sold had there been no threat of vesting. R. 438. This is confirmed by contemporary correspondence.[5] There is no evidence to the contrary.

The moneys employed by Vort to purchase the shares in 1943 from Ward and Lancaster were his own. R. 169, 1039, 1047. At the time of the purchase neither Basch Co. nor the shares were blocked. R. 1044-1045. Prior to the purchase, Vort had seen affidavits supplied by Lancaster and Ward to the government affirming that they owned the shares free and clear, R. 169, 171, 1043, 1051; he had seen the government notification that Basch Company, earlier blocked by special order, was unblocked, R. 169, 1045, and had no reason to doubt that Ward and Lancaster were the owners of the shares. R. 170, 171.

The 1947 Purchase

In January, 1947, Vort bought 90 shares from Ward and 28 shares from Koch. Ernest Nauen bought 40 shares from Ward. The court below found that

> "At that time the Government had made no determination that either Basch & Company or its share-

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[5] On October 17, 1942, Koch wrote Ward, R. 1142:

> "Paul [Vort] wants some way worked out whereby he and Fred [Basch] will have a majority of the stock, but I see no reason why we should accede to their wishes. If Mr. Cowen succeeds in getting the company cleared with the stock ownership as it is at present, I do not see why we should agree to any change."

For similar letter, September 12, 1942, DJ-W503, Koch to Ward, see R. 1142. See Cowen's letter, supra, p. 5. The jealous tenacity with which the 51% guarded its control is illustrated by Koch's letter, Appendix to Cross-Petition, xii-xiii.

> holders were enemy material [sic.; probably 'nationals'] and the shares were not blocked. There is nothing to show that any money, other than the Plaintiff's, was used in this transaction and in my opinion the purchases were valid." R. 85.

Defendant "accepts" the findings of fact. Petition, fn. 1. Basch Company was "blocked" in May, 1942, and "unblocked" in June, 1942. R. 1044-1045. It was first "blocked" again in December, 1948, when Defendant undertook the "direction, management, supervision and control of Herman Basch & Company." R. 7-8. None of the shareholders were ever "blocked."

Vort bought the shares, both in 1943 and in 1947, on his own behalf, R. 174, and paid for them with his own moneys, R. 172-173, 1053-1056, as did Nauen, R. 699-701, 1076-1078. This is conceded by Defendant. *Supra*, note 1. Both Vort and Nauen paid high-bracket income taxes on dividends received from these shares. R. 174, 700-701. Both spent the remainder after taxes for their own purposes. R. 174, 701.

ARGUMENT

Introductory

The grant of certiorari in this case would be in the public interest. Defendant would convert the "freezing controls" into a shambles. He needs to be forcibly told that his powers are sharply limited. Even the trial judge, quick to resolve all doubts against plaintiffs, as our cross-petition shows, could not stomach defendant's position on this score.

We owe it to the Court, however, to point out that this part of the judgment below is correct, and that defendant's entire argument rests on findings of fraud and conspiracy that are riddled with error. See our cross-petition. First, some preliminary considerations.

1) Of the contentions now made by defendant, he argued in the trial court only one—that no German interest could pass without a license. Def. Supp. Trial Memo., 10, Memo. of Def. pp. 9, 4-5. The court below was advised that defendant could not first make these arguments on appeal, Brief for Appellees, 34-35, and presumably disregarded them. *Lehker* v. *Joyce*, 273 Fed. 763 (App. D. C.); *Petition of Herschmann*, 163 F. (2d) 865, 867 (C. A. 7). For the same reason, these arguments cannot now be made in this Court, for it has been deprived of the benefit of analysis by the lower courts. *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 50; *Wood* v. *Weimar*, 104 U. S. 786, 795.

2) Defendant professes to accept "all of the findings" of the trial court and to present "only questions of law." Petition, 4, fn. 1. In fact, however, defendant attempts to rebut the findings that plaintiffs bought on their own behalf with their own moneys, *supra*, fn. 1,[6] as both courts have found. Petition 13, 11.

3) Defendant pitches his case on the argument, not made in the trial court, that a "cloak" cannot buy German

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[6] At p. 12, defendant argues that Markham's approval in 1943 "was induced by false representations made by or on behalf of the respondents *as part* of what the courts below have found to be a '*conspiracy*' (R. 81) for the 'fraudulent *concealment* of the German interests' (R. 84)." Petition 12. There is no finding that approval was so "induced". Again, defendant argues that in 1943 plaintiffs

> "had two aims: *to conceal* the *German ownership* of the Althor shares to be sold by Ward, Lancaster, and Koch, and to *convince* the Government that the *purchasers were not* themselves *acting for the Germans* . . ." *Id.* at 20.

The trial court made no such finding. Moreover this is inconsistent with defendant's admission that in 1943

> "Vort purchased these shares with his own money and intended to hold the shares as his own property, with the intent that *he*, together with respondent Nauen and Fred Basch, *should control* the Althor corporation." *Id.* at 10.

property located in the United States on his own behalf.[7] The trial court properly found that

> "There was no reason why the plaintiffs could not be the purchasers." R. 85.

and was affirmed on appeal.

The prohibitions of the freezing control are directed to "foreign nationals," Petition, 34. Section 5 E(iii) of Executive Order 8389 (reported in 12 U.S.C.A. §95a, note, at pp. 456-459) provides that "foreign national" includes

> "any person *to the extent* that such person is, or has been * * * *acting* * * * *for* the benefit or on behalf of any national of such foreign country * * *."

In buying for himself in 1943 Vort was not acting for the Germans, and was not a "foreign national" with respect to the shares so purchased. If we assume arguendo that he acted on behalf of the Germans in the 1939 purchase, he was a "foreign national" only to that "extent." Hence Vort was subject to the prohibitions only "to the extent" that he acted for the Germans.[8] And on the assumption that he was a "cloak" for some shares,

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[7] Defendant concedes that "If Vort had in fact no connection with any 'cloaking' scheme, then he could have been a bona fide purchaser", Petition, 20, fn. 19, and "would be entitled to recover the shares". Petition, 25, fn. 24. A grant of defendant's petition therefore requires that our cross-petition be granted so that the Court may review the findings of fraudulent conspiracy upon which defendant's case rests. A reversal of the 1939 portion of the judgment admittedly would therefore dispose of defendant's petition. See also Cross-petition 6.

In this connection, we omitted to mention in our Cross-Petition that the Court of Appeals erroneously applied the test of "substantial evidence," R. 1302, when the true test in a *fraud* case is "clear, unequivocal and convincing" evidence. Cross-Petition, 16.

[8] It is to be borne in mind that *vesting* as well as freezing extends to property of "foreign nationals." Obviously, only the shares held by a cloak for a German were vestible. Defendant himself did not vest the shares concededly bought by Vort in 1939 for himself. Cross-petition, 4. This confirms that "foreign na-

he was nevertheless eligible to buy other shares for himself because the prohibitions were inapplicable to such transactions.

Common sense suggests as well that no national interest would be threatened even if a *German*, resident in the United States, were to purchase for himself a delicatessen in Yorkville secretly held by an American for a German in Germany. All the less would the purchase on his own behalf by a resident American injure the national interest. The "enemy" interest could be reached by vesting the proceeds of the sale, as defendant did here.

4) Defendant urges that his power to vest cannot be limited by his predecessors' acts. Petition, 18-19. The real issue is whether he may vest property purchased by an American under the license of his predecessor. To permit defendant to vest property so purchased would transform licensing into a slaughter house. *Infra*, p. 28. This Court recently rejected contentions by defendant that were inconsistent and "irreconcilable" with the position of his predecessors. *Zittman* v. *McGrath*, 341 U. S. 446, 459.

5) Defendant argues that plaintiffs are barred from recovery because they falsely represented that neither they nor the 1943 vendors held shares for the Germans. Petition, 19-23. This argument, not made in the trial court, premises participation in the 1939 "conspiracy." It admittedly collapses if the conspiracy findings are as untenable as our cross-petition demonstrates them to be. Petition, fn. 19. In any event, defendant's predecessor, confessedly knew enough in 1943 to be suspicious of

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tional" does not embrace the purchase of shares by a "cloak" for himself.

Compare *Standard Oil Co.* v. *Markham*, 64 F. Supp. 656 (S. D. N. Y.) (Wyzanski, J.), where property bought by an alleged cloak for itself was ordered returned despite the fact that other property was bought by it as a cloak.

fraud and is charged with full knowledge of all the facts which his investigation subsequently disclosed. *Infra,* 27. The fact is that plaintiffs did not "induce" defendant's predecessor to consent to a sale. There is no finding that they did. The vendors sold unwillingly and because they were under steady pressure by the government to sell, *infra,* p. 24, and as the courts below properly held, plaintiffs were as free to buy as anybody else.

6) Defendant is playing both sides of the street. He vested not only the shares bought by plaintiffs, but the proceeds of the sale received by the vendors and has since "collected" from the vendors. Petition, 25, fn. 24.[9] He is only empowered to vest enemy, not American, property. *Infra,* note 33. Either the shares or the proceeds are enemy property, not both. The proceeds were vested on the *determination* that they were "debts * * * owing to," "owned by" or "held on behalf of" Thorer & Company. Vesting Order 13853, 14 F. R. 5855 (Sept. 24, 1949). Defendant could make that determination honestly only if he determined that title to the shares passed to Vort and that the consideration was "held" for Thorer and Company by Ward, et al. He cannot here take an inconsistent position.

Defendant suggests that he may "forfeit" the shares under Section 16. Petition, 25, fn. 24. The coupling of criminal sanctions and forfeiture in Section 16 indicates that forfeiture like criminal process requires jury trial. Under the Constitution, forfeitures of property seized on land require a jury trial, as the Attorney General

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[9] Plaintiffs paid $600 a share in 1943. R. 1153. In 1947, after the 4 for 1 issuance of Basch for Althor shares, R. 154-155 they paid $300 per Basch share or $1200 per Althor share. Plaintiff's Exhibit 37 (unprinted). Markham testified that he was satisfied in 1943 that "the price was adequate." R. 134, 126. There is not and cannot be a suggestion that the prices were not fair. By vesting the proceeds, defendant fully reached the "enemy" interest.

himself maintained from the beginning. *The Sarah*, 8 Wheat. 391, 392; *Union Insurance Co.* v. *United States*, 6 Wall. 759; *Confiscation Cases*, 7 Wall. 454, 462.

II. The Licensing Issue

Defendant argues that "*leaving aside the assurance given by Mr. Markham*," the purchases would have been invalid under the Trading with the Enemy Act. Petition, 16. We shall show that 1) the Custodian licensed the sale; 2) he was authorized to do so; 3) no license was required in this case by Executive Order 8389 or by the Statute; 4) the Statute conferred no jurisdiction over the purchase of property in the United States by Americans, and 5) if construed to confer such jurisdiction, the Statute is unconstitutional.

1) Defendant does

> "not question Mr. Markham's authority as Deputy Alien Property Custodian to give *an oral license*,[10] had he intended to do so . . ." Petition, 17, fn. 16.

Markham told Cowen that he "had no objection to the sale", R. 116, that the vendors "had a proper right to sell it", R. 117, that he would not "vest the shares", R. 120, and that "the purchasers would get a good title." R. 117. See supra, pp. 5-6. To license is merely to give "leave or permission", *The Concise Oxford Dictionary*. In stating that he "had no objection", Markham plainly gave "leave or permission". Against this defendant argues (Petition, 17) that "no license was applied for" and

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[10] Neither the Act nor Executive Order 8389 requires that a license be in writing. To the contrary, Section 1 of the Order provides that transactions may be authorized by "instructions, licenses or otherwise." A license may be created by parol, *Jackson* v. *Emmons*, 19 App. D. C. 250, 256-257 (1901); *Sweeney* v. *Bird*, 293, Mich. 624, 292 N. W. 506. A license

> "may be implied from the acts of the parties." *Sullivan Timber Co.* v. *City of Mobile*, 110 Fed. 186, 195 (C. Ct. Ala.)

that Markham "testified * * * that he gave no license" citing T. R. 19. At the cited point, Markham testified that

> "there was a determination somewhere along the line that *no license was required from Treasury.* We gave them no license. They could act on their own."
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> * * * *
>
> "Q. Well, *is it fair to conclude,* then that in this case *you didn't waive a license* as such?
> A. *No.* There was no requirement that they procure a license from the Alien Property Custodian, and I don't think that there was a requirement that they procure one from the Treasury." R. 123.

In short, since no license was required, Markham did not give a written license. But he did not repudiate his

> "assurance [to Cowen] that * * * he could dispose of them [the shares], that they were not going to be vested by me." R. 121.[11]

2) Assuming that Ward and Lancaster held their shares for enemies, the Custodian was authorized to license the sale of enemy shares. Defendant does not "question * * * Markham's authority * * * to give an oral license." Quoted supra, p. 13. The concession is inescapable. By Section 2(a) of Executive Order No. 9095, 50 U.S.C. App. §6, note, the Custodian was "empowered to take such action *as he deems necessary*" with respect to

> "any business enterprise within the United States which is a national of a designated enemy country * * * and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof."

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[11] Indeed, he could not repudiate the interpretation a reasonable man would place upon his acts if he would:

> "With a few exceptions the law attaches legal consequences to what parties do, quite independently of their private purpose or intent." *Richardson* v. *Smith,* 102 F. (2d) 697, 699 (C. A. 2), per L. Hand, J.

He therefore had complete discretion to license,[12] and was *authorized to license* the 1943 and 1947 sales of the shares.

3) Neither the Executive Order nor the Act required a license in this case. Markham, the former Alien Property Administrator, so testified, supra, p. 14, and his view is richly supported by the administrative practice, the language of Executive Order 8389, and the legislative history.

a) As distinguished from property held by actual foreign nationals, Germans, Norwegians, etc., which was *automatically blocked,* Executive Order 8389 required a *"blocking" order* to reach property held by Americans. This was the Treasury interpretation and practice. In the words of the official Treasury explanation:

> "Under the power given to the Secretary of the Treasury to define as a national any person *determined* by him to have been *acting* directly or indirectly *for the benefit* * * * of a blocked country, many of *our citizens,* and the business enterprises owned or controlled by them, *have been declared* to be nationals of blocked countries." Administration of the Wartime Financial and Property Controls of the United States Government. (Treas. Dept., 1942) p. 32.

In accordance with its interpretation, Treasury Department "designated" Basch Co. as a "foreign national"

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[12] No mandatory duty to vest limits the discretion to license. As delegate of the President, the Custodian was given discretion to vest "when, as, and upon the terms, directed by the President" (Section 5(b) of the Act); and the President by Section 2 of Executive Order No. 9095, as amended, authorized the Custodian "to take such action as he deems necessary * * *." In the original Act, it was also left in the Custodian's

> "discretion to decide what property shall be taken over and transferred." Statement of Assistant Attorney General Warren, who explained the Bill. Hearings, House Committee on Interstate and Foreign Commerce, H.R. 4960, 65th Cong. (1917) p. 36.

and "blocked" it in May, 1942, R. 1044, corroborative evidence that it had not been "blocked" automatically by the terms of the Order. Such "blocked" corporations or American citizens could, of course, be subsequently "unblocked", as was the Basch Company in June, 1942. R. 1045. Defendant himself next "blocked" Basch Co. on December 22, 1948, after *determining* that it was acting on behalf of a foreign national. R. 7-8. He concedes that "no specific order * * * issued with respect to the shares", Petition, 17, fn. 15. If Basch Co. and its shareholders were automatically blocked, as Defendant now contends, the Treasury and Defendant himself were going through crazy gyrations in blocking, unblocking and again blocking, upon express "determinations." Actually they were giving effect to the requirements of "8389."

Section 5E(iii) of "8389" contains a general provision defining "national" to include

> "Any person to the extent that such person is, or has been * * * acting * * * for the benefit or on behalf of any national of such foreign country * * *." Cited supra, p. 10.

The last sentence of Section 5 E(iv), however, contains a special provision declaring that "national" shall include

> "any other person who is *determined* by the Secretary of the Treasury to be, or to have been * * * acting * * * for the benefit of a * * * national [of a foreign country] * * *."

If, in disregard of this special proviso, we read "8389" to provide that "any" person "acting for the benefit" of foreign nationals is automatically a foreign national under Section 5 E(iii) then the special proviso is rendered nugatory.[13] There would be no occasion for a "determi-

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[13] For the distinction drawn in Executive Order 8389 between "blocked" and "unblocked" property, defendant would substitute a distinction between purchasers with knowledge and those without. Petition 25, fn. 24. The Order makes no mention of exemptions from "blocking" for bona fide purchasers.

nation" by the Secretary that a person was "acting for the benefit" of a foreign national. It is settled that "specific terms prevail over the general", *MacEvoy* v. *United States,* 322 U.S. 102, 107, particularly when a contrary view would convert the specific terms to surplusage. Cf. *Platt* v. *Union Pacific R.R. Co.,* 99 U.S. 48, 58.[14]

b) Defendant, citing *Schrijver* v. *Sutherland,* 19 F. (2d) 688 (App. D.C.), would have it that enemy property located in the United States cannot under the common law be sold to an American. Petition 16. That case was decided under the Trading with the Enemy Act prohibition of "trading" with an "enemy", defined by §2 as one "resident" in enemy country. It held that a German, resident in Germany, could not in World War I transfer good title to shares in an American corporation to Dutch vendees. The distinction between that case, in which an enemy resident in enemy territory strengthened the enemy by siphoning the proceeds of sale of his American assets into Germany, and this case, where the proceeds of sale by a resident American never left this country, has long

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Defendant resorted to the "bona fide" distinction to escape from the fact that "automatic" blocking of property held by Americans would have subjected American purchasers to the risk of confiscation; it would have entrapped unsuspecting purchasers who had no reason to believe that Americans were acting for Germans in selling property. This would have been both unreasonable and oppressive. A "blocking" order foreclosed precisely such inquiries, namely whether purchasers *knew* that Americans were acting on behalf of Germans. A published blocking order would put all on notice.

[14] In *Propper* v. *Clark,* 337 U.S. 472, 486 cited by defendant, Petition, 17, this Court was careful to state:

> "We do not now undertake to say whether *every determination* of rights concerning *blocked* property in unlicensed litigation is voidable."

The challenge to defendant's jurisdiction here presented was not presented nor considered in the *Propper* case.

been recognized. Thus a transfer under a power of attorney for the sale of real estate, running from a Confederate principal to an agent resident in Union territory, was held valid notwithstanding the intervention of war. *Williams* v. *Paine,* 169 U.S. 55, 74-75.

The parallel §3, also cited by Defendant, Petition, 16, is merely declaratory of this rule.[15] The principles were summarized in *Sutherland* v. *Mayer,* 271 U.S. 272 where it was argued that §3 "expressly prohibited" (p. 275) the "trading" there involved:

> "during the war all intercourse, correspondence and traffic between citizens of this country and of Germany, which would or might be to the advantage of the enemy, were absolutely forbidden.
>
> "The purpose of the restriction is not arbitrarily and unnecessarily to tie the hands of the individuals concerned, but to preclude the possibility of aid or comfort, direct or indirect, to the opposing forces. It is *that purpose* which gives birth to the rule and *indicates its limits.*
>
> "Agencies created before the war, and not requiring intercourse across the enemy's frontier, such as for the collection of debts, preservation of property and so forth, are not terminated by war." (pp. 286-288)

On the theory of Defendant, Ward et al were holding the shares for the benefit of their German principals. Under pressure of the government, they sold the shares in an effort to preserve the property and kept the proceeds in this country. It follows that the sale was not forbidden by §3.

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[15] The Attorney General said with respect to §3: "I cannot see that the Trading with the Enemy Act adds anything in these respects to the law that was previously recognized. These provisions of the Act of Congress are but declaratory of what was the law before." 32 Op. Atty. Gen. 65, 69.

3) No jurisdiction over sales by Americans of property in the United States was conferred by the "freezing" enactments. In amending §5(b) of the Trading with the Enemy Act by Title III of the First War Powers Act, 1941, 55 Stat. 839, 50 U.S.C. App. §5(b) which ratified prior "freezing" action to the extent that it came within the scope of the amendment, Congress did not intend to go beyond the limitations imposed by §3. To the contrary, it was assured by the House Committee Chairman, Hatton Sumners, that it was merely adopting a replica of the old Act:

> "* * * for all practical purposes we may say there is no substantial difference. * * * The Committee was largely persuaded by the discovered facts, the recognized facts, that there is no substantial difference insofar as the committee could discover between the powers we propose to grant to this President and the powers which President Wilson had." 87 Cong. Rec. 9859 (1941)[16]

The anxious doubts whether Americans were embraced by the proposed Act were set at rest in a debate that was aptly summarized by Congressman Williams:

> "It [the "freezing control"] followed immediately the invasion of Norway, Belgium, and Holland by Germany, and it was enacted for the very purpose of protecting their nationals and their property in this country from transactions and transfers forced upon them by the Germans at that time. That was the purpose of it. There was no intention and there is

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[16] Mr. Springer stated that Title III: "has practically the identical provisions, as I understand it, that the bill contained which was in force during the last World War." 87 Cong. Rec. 9865 (1941).

Mr. Kefauver stated: "In any event, this *does not go any further than* the present law?"

Mr. Gwynne: "That is correct. There is no doubt of that." *Id.* at 9863.

> no intention at all now that it should be applied to any transactions or any property in which an American citizen has an interest." 87 Cong. Rec. 9865 (1941). See Appendix for corroborative extracts from the debate.

The accuracy of Congressman Williams' statement is attested by the earlier representations made to the Congress. In 1940, when the Treasury Department sought ratification of Executive Order 8389, Congress was assured that the only purpose of the freezing control was to circumvent Nazi looting at the point of a bayonet in the invaded countries. This clearly appears from the Senate debates.

> "Mr. Connally: And is not this measure for the purpose of preventing change of title of the property here in the United States by conquest, or by any other forcible or violent means?
> "Mr. Wagner: That is exactly the purpose." 86 Cong. Rec. 5007 (1940).[17]
>
> • • • •
>
> "Mr. Connally: For instance, the stock certificates might apparently be properly endorsed. • • • It would not show the bayonet sticking in the ribs of the man who owned it when he signed the transfer. I am talking about the citizen of Denmark, Norway, or any other foreign country." *Id.* at p. 5178
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> • • • •

A transfer by one American to another in the United States would not be coerced by a German invader. In claiming jurisdiction over the sale by Ward to Plaintiffs, Defendant is seeking to subvert the freezing controls and

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[17] "Mr. Wagner: 'Under the proposed law the United States Government would inquire into the reason for the transfer, the circumstances under which it was asked. If we found that it was the result of duress, we would refuse to grant a license. It was a protective measure.'" 86 Cong. Rec. 5007 (1940).

to grasp for a jurisdiction that was withheld. The intention of Congress must be given effect.[18]

4) The failure to provide for judicial review[19] renders the licensing power unconstitutional. The blocking of a citizen's bank account, for example, is unreviewable. A denial by the administrators of a petition by Vort or the Vendors for a license would not have been subject to judicial scrutiny. Nor, on Defendant's theory that the shares remained enemy property in Vort's hands, was he free to sell them. Thus the right of a citizen freely to use, sell or buy property was restricted[20] without any provision for judicial review to determine if in fact the "frozen" assets were "enemy" property.

A deprivation of the attributes of ownership without provision for judicial review constitutes a denial of due process. Where a rate-making statute lodged "no power in the courts to stay the hands of the Commission," this Court said that:

> "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution • • •." *Chicago, M & St. P.R. Co.* v. *Minnesota*, 134 U.S. 418, 458; and see *Southern R. Co.* v. *Virginia*, 290 U. S. 190; *American Trucking Associations* v. *United States*, 21 L. W. 4096, 4102 (Jan. 12, 1953)

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[18] *Hawaii* v. *Mankichi*, 190 U.S. 197, 212; *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 391; *United States* v. *Rosenblum Truck Lines*, 315 U.S. 50, 53.

[19] The remedy conferred by §9 is confined to the return of vested property.

[20] The Constitution protects the "right to acquire, use and dispose of" property. *Buchanan* v. *Warley*, 245 U.S. 60, 74.

And since violation of the Executive Order or regulations is without more made a severely punishable crime by §16 of the Act, it is again unconstitutional because, in effect, it prohibits an American from seeking judicial construction of the law. Cf. *Ex Parte Young*, 209 U.S. 123, 147; *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331, 337; and see *Natural Gas Pipeline Co.* v. *Slattery*, 302 U.S. 300, 310.

It follows that to take Defendant's view is to render the licensing power unconstitutional as against Plaintiffs, American citizens and residents. In construing a statute, the Court is under a duty to reach a conclusion.

> "which removes it farthest from possible constitutional infirmity." *Kovacs* v. *Cooper*, 336 U.S. 77, 85; *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331, 346.

III. The Sales Were Valid Under Private Law

Defendant argues that since Ward *et al.* were only given a power to conceal, not to sell, as Plaintiffs allegedly knew, Plaintiffs could not get title, that their attempt to do so was a "breach of faith" with their German coconspirators. Petition, 15. This point was not argued in the trial court; it was therefore not available in the court below and is unavailable here. On Defendant's theory, no "conspirator" may abandon a conspiracy for that would "break faith" with his German confederates. But nothing

> "take[s] from a conspirator the power to withdraw * * * or to avert a continuing criminality." *Hyde* v. *United States*, 225 U.S. 347, 369.

In the absence of an express power to sell, a Trustee normally has implied powers of sale. 3 Bogert, Trusts and Trustees, p. 408 (1946). Either "blocking" or vesting would have led the Jewish trade to suspect German ownership and exposed the value of the securities to de-

struction, Supra, p. 5 (Percus letter), R. 391, 402, 1106, 1107; Transcript (unprinted) 602. The sale was made so that "vesting could be avoided and the value saved for the remaining shares." Supra, p. 4. Even as "agent," let alone as "trustee," Ward had an implied power to take any action necessary to salvage what he could.[21] Assume an unproven limitation on Ward's authority, no one would contend that an agent with authority limited to storing goods in a riverside warehouse could not remove the goods above flood-tide to save them from rising waters. Ward did no more. Finally, when the Government insists upon a sale, as the facts demonstrate, infra, p. 24, it cannot thereafter urge that the seller was without authority to pass title and make the sale demanded by it, especially after it has seized the proceeds of the sale.[22]

IV. Lancaster Took and Conveyed Good Title

William Lancaster, long a partner of the law firm of Shearman & Sterling, who received 17 shares (which he sold to Vort in 1943) from his associate Stevenson, counsel to Basch Co., did not betray his country for a paltry

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[21] "Where an entire business is placed under the management of an agent, the authority of the agent may be presumed to be commensurate with the necessities of the situation." *Johnson* v. *J. H. Yost Lumber Co.*, 117 F. (2d) 53, 59 (C.A. 8). The powers of a trustee are likewise "commensurate with the duties which the trust devolves upon him." *Village of Brookfield* v. *Pentis*, 101 F. (2d) 516, 522 (C.A. 7).

[22] To argue, where Ward was constrained by the Government to sell, and did so to save the securities from destruction threatened in the absence of sale, that the sale "as against the Germans" was "fraudulent and inequitable", Petition, 15, is sheer nonsense. When the Government says "sell or we vest", it is foreclosed from arguing that "the purchasers intended to prevent the United States from vesting". *Id.* at fn. 13. Nor is the argument open in the light of Cowen's and Percus' advice to the Custodian that the sale was being made only to avoid the threatened vesting. Supra, p. 5.

$3400. We have shown that he knew nothing whatsoever of the alleged conspiracy. Appendix to Cross Petition, i-ii. In that event, Defendant concedes, he would get good title as a bona fide purchaser. Petition 25, fn. 24. Assuming that Vort had knowledge of a conspiracy about which Lancaster knew nothing:

> "One who buys property from an innocent bona fide purchaser is protected by the good faith and innocence of his grantor, although he may himself have notice of antecedent defects or equities that would have defeated his title if he had been the first purchaser." *Ryan* v. *Staples,* 78 Fed. 563, 564 (C.A. 8). See also *Atlantic Mortgage and Finance Co.* v. *Hamilton,* 40 F. (2d) 583, 585 (C.A. 5).

Lancaster got and conveyed good title to Vort.

V. Defendant is Estopped

1) From 1942 onwards, the government constantly pressed the vendors to sell. Ward, Koch, Mahler and Stevenson testified in depositions taken by Defendant that they were notified by their counsel Cowen, first of Treasury's insistence that Hollender's former attorneys, Ward and Stevenson, and his relative Koch sell their shares, and second, of the Custodian's insistence on a sale on pain of a vesting. Supra, pp. 4, 5, 6-7. The contemporary letters written by Ward, introduced in said depositions, confirm this testimony, ibid. Such correspondence likewise confirms Koch's testimony that he would not have sold but for government pressure to sell. Supra, fn. 5. Ward's 1943 undated letter recites Cowen's warning that the shares "would be vested unless" the holdings of the former attorneys and relative "could be reduced." Supra, p. 3. Stevenson "was willing [to sell] if vesting could be avoided." supra, p. 4. Markham invited Cowen to write about the sale; Percus did so at Cowen's request, adverting to the ominous consequences of a vesting, supra, p. 5, a polite intimation that the proposed transfer was

designed to avert a vesting. At the same time, Cowen wrote Markham's subordinate Rubin that the shareholders did not desire to sell, but would do so *if* a sale would "free" the company of "governmental supervision or restriction." Ibid. In the ensuing conference between Cowen and Markham, as Markham diplomatically phrased it,

> "a *suggestion* was made, or a *modus operandi* was worked out, whereby"

Ward, et al., would sell to "Vort's group." R. 115. Plainly, there was pressure by the government for a sale.[23]

Whether or not there was pressure, Markham said he told Cowen that he had no objection to the sale, gave Cowen the

> "assurance that * * * he could dispose of them, that they were not going to be vested by me." R. 121;

which the court below properly characterized as the "assurance of the United States." R. 122. Even without an

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[23] In Interrogatories executed by Cowen, then Ambassador of the United States to the Philippines, R. 41, 54, now Ambassador to Belgium, he stated:

> "It was definitely indicated to me that if their shareholdings were not reduced below 25% of the outstanding shares of the corporation, there would be a vesting, and it was similarly indicated to me that if such a reduction was effectuated, there would not be a vesting." R. 55

The interrogatories were erroneously excluded by the trial court on the ground that the questions were "leading". Plaintiffs were under pressure of a rapidly approaching trial. The interrogatories and cross-interrogatories went forward on July 17, 1950; the pretrial was heard on October 9, 1950; the interrogatories were received from the Ambassador and filed on October 16, 1950. There was no time to reframe and reframe questions. See *Ewing* v. *Moses*, 51 Ga. 410, 419 (1874).

Plaintiffs thereafter submitted a new set of interrogatories at the beginning of the trial, R. 348. On January 26, 1951, the trial court struck these new interrogatories as coming too late, R. 506-508, though the trial ended on March 7-8, 1951. Unprinted transcript 3422. Manifestly this was an arbitrary abuse of discretion.

"assurance," mere acquiescence with notice would give rise to an estoppel:

> "If a party has an interest to prevent an act from being done, has full notice of its being done, and *acquiesces in it* so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has *no more right to challenge the act* to their prejudice *than he would have* had if it *had been done by his previous license.*" *Leather Mfgs. Nat. Bank* v. *Morgan,* 117 U.S. 96, 113.

See also *Goodman* v. *Dicker,* 169 F. (2d) 684 (App. D.C.)

Against this defendant argues that a) defendant is not bound because Markham's action was induced by "concealment and affirmative misrepresentation" as to the 1939 conspiracy; Petition, 20, and b) Markham had no authority to bind a successor not to vest. Id. at 18.

a) Defendant persistently ignores the fact that the government *pressed* for the sale, that the parties *did not induce* it to consent to a sale. We have shown in our cross-petition that plaintiffs' knew nothing of any conspiracy to defraud the United States. It would unduly extend this brief to demonstrate that Plaintiffs were not parties to any misrepresentations made in 1943 by others.[24] Instead, we shall show that Defendant's predecessor knew so much in 1943 as to be chargeable with knowledge of all the facts pertaining to the alleged fraud.

This Court has held that

> "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." *Wood* v. *Carpenter,* 101 U.S. 135, 141.

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[24] Cowen's letter cited by Defendant at Petition, 7, patently is written on behalf of the sellers, not Plaintiffs.

Defendant himself states that

> "In 1943 Ward, Lancaster and Koch *were under* some *suspicion* * * * Ward and Lancaster * * * because they had acted as attorneys for Thorer and Company and because they had received 'fees' sufficient to finance the purchase of the shares they claimed to have made in February, 1939 * * * Koch had also received 'fees' and was a relative of Paul Hollender, one of the heads of Thorer and Company * * *. They *were also under investigation* because Ward and Koch at least were connected with the companion Thorer Company of Thorer and Hollender * * * [the shares of which were vested by the Custodian, R. 119]," Petition, 20, fn. 19.

It follows that Defendant's predecessor knew enough of the facts to create "a suspicion of fraud" and to be chargeable with full knowledge of whatever facts pertaining to the fraud could have been discovered, as in fact they were later discovered upon further investigation. Petition, fn. 21. Hence, he cannot now "claim to be deceived." *City of del Rio* v. *Ulen Contracting Corp.*, 94 F. (2d) 701, 703 (C.A. 5).[25]

b) In arguing that Markham had no authority to bind a successor not to vest, Petition, 18, Defendant presents a false issue. The true issue is whether Markham was authorized to license Americans to buy enemy property located in the United States, and whether the government may vest property purchased under its license. For if

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[25] The discovery of the Ward-Koch-Hollender correspondence in Koch's files in 1945 (Petition 22, fn. 21) did not further implicate Plaintiffs. There were no letters to or from Plaintiffs, and Ward and Koch repeatedly testified in their depositions taken by Defendant, that Plaintiffs were never told of these communications or Hollender's plans. Appendix to cross-petition, fn. 3. For this reason, Defendant was driven to assert that the case "stands or falls on what happened" at Trenton. Id. at viii. The fact that Plaintiffs there purchased subject to the same options as did the Ward-Koch axis had been disclosed to the government in 1941 Id. at vii.

there was authority to license, as Defendant concedes, supra, p. 14, there was necessarily a total absence of power after licensing to vest the property purchased by an American on his own behalf in reliance [26] on a license. Otherwise, licensing would be converted into a betrayal of American rights. By the logic of Defendant, a landlord who licensed an entry on his land would be authorized to shoot down the licensee as a "trespasser." Licensing would no less be a snare if the government could subsequently vest the property of one who purchased under its duly authorized license.

Of course, the United States cannot be estopped "by the *unauthorized* acts or declaration of its agents," Petition, 19. Estoppel cannot confer *power withheld* by the legislature. That is not our case. The Custodian was authorized to license a sale and did so.[27] Supra, p. 14. An Agency may be estopped when the acts of the officers were authorized:

> "The acts or omissions of the officers of the government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the government, if the officers have acted within the scope of their authority." *Ritter* v. *United States*, 28 F. (2d) 265, 267 (C.A. 3).

See also *United States* v. *Denver & R.G.W.R. Co.*, 16 F. (2d) 384, 376-377 (C.A. 8).[28] For an estoppel case dis-

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[26] Defendant concedes that "Vort bought" the shares from Ward and Lancaster "upon receiving this assurance from Mr. Markham". Petition, 10.

[27] Hence the cases cited in Petition, 19, are inapplicable.

[28] Accord: *Iowa* v. *Carr*, 191 Fed. 257, 270 (C.A. 8); *Walker* v. *United States*, 139 Fed. 409, 413 (C. Ct. Ala.); *State of Indiana* v. *Milk*, 11 Fed. 389, 396 (C. Ct., Ind.); *Cahn* v. *Barnes*, 5 Fed. 326, 334 (C. Ct., Ore.). See also *Knapp-Monarch Co.* v. *Comm'r. of Internal Revenue*, 139 F. (2d) 863, 864 (C.A. 8); *David J. Joseph Co.* v. *United States*, 82 F. Supp. 345, 351 (Ct. Cls.); *United States* v. *Stinson*, 125 Fed. 907 (C.A. 7).

tinguishing between authorized and unauthorized conduct see *United States* v. *Big Bend Transit Co.* 42 F. Supp. 459, 474 (E. D. Wash. N. D.).

Defendant counters by the assertion that

> "the United States is not bound by the action of the President . . . in *returning* seized *enemy* property when the action results from mistake or fraud." Petition, 19.

The cases cited show that the President was *unauthorized* to make *returns to enemies.*[29] Those cases are inapposite because the licensing of a sale of unvested property was authorized. And there could be no "mistake" where the government was advised of the sale and was on notice of facts which made it chargeable with knowledge of the alleged fraud.

There remain the "unclean hands" cases cited by Defendant (Petition, 23) such as *Precision Inst. Mfg. Co.* v. *Automotive M.M. Co.*, 324 U.S. 806; *Standard Oil Co.* v. *Clark*, 163 F. (2d) 917 (C.A. 2). The latter case squarely rejected application of that doctrine to recovery of property seized by the Custodian:

> "Plaintiffs' hands are unclean, says defendant, because of misrepresentations by Jersey of the actual relationships between it and I.G. * * *"

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[29] *Swiss Nat. Ins. Co.* v. *Crowley*, 136 F. (2d) 265 (C.A. 2) and *Isenberg* v. *Biddle*, 125 F. (2d) 741 (App. D.C.), involve *unauthorized* returns to enemies. Since such returns were unlawful, the government, held *Cummings* v. *Societe Suisse* etc., 85 F. (2d) 287, 289 (App. D.C.), "is never bound by the unlawful action of its officers." After a trial of the same case, the appellate court agreed that a return to the Swiss claimant was unauthorized where the real owner was a German enemy corporation and "so the question of actual fraud may be said to be out of the case". *Societe Suisse etc.* v. *Cummings*, 99 F. (2d) 387, 392 (App. D.C.). Similarly, the fact that no return could be made to a German citizen, made "unnecessary any consideration of the evidence as to the allegations of fraud . . ." in *United States* v. *Rodiek*, 117 F. (2d) 588, 594 (C.A. 2).

> "If Plaintiffs were seeking enforcement of obligations arising under an illegal arrangement, a court would not lend them its aid. * * * Here, however, they are *seeking return of property* owned by them. This right is specifically written into a statute providing for government seizure of property. *Nowhere* in the statute is there written any *restriction of the right* to the return of property * * *". 163 F. (2d) at 926.[30]

Judge Wyzanski justly said that the "unclean hands" defense would in such case permit an officer to

> "retain with impunity property which he had unlawfully seized * * *." *Standard Oil Co.* v. *Markham*, 61 F. Supp. 813, 815 (S.D.N.Y.)

Under the Act an American must summarily turn over his property if the Custodian determines that it is enemy owned. Cross-Petition, 8. Were he not permitted to reclaim his own property because of "unclean hands" there would be an unconstitutional confiscation without judicial review.

VI. The 1947 Purchase

The courts below found that in 1947 the shares were not blocked and that neither the Basch Company nor its shareholders had been designated by the government as enemy nationals. Supra, p. 8. This finding is fully supported by the record; there is not a scrap of evidence that contradicts it. The shares were bought by Plaintiffs with their own moneys on their own behalf, as Defendant

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[30] The Court of Appeals took account of *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806, cited by Defendant, and said:

> "no cases on patent infringements where the defense of unclean hands based on the anti-trust law has been sanctioned go so far. * * * Indeed, in *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 413, 414 * * * the Supreme Court reversed as confiscatory portions of a decree requiring compulsory licensing of patents by certain violators of the anti-trust laws." 163 F. (2d) at 926-927.

concedes. Supra, note 1. The arguments earlier made are equally applicable to the 1947 purchase.

Defendant may invoke, as he did below, Markham's letter of November 28, 1945, R. 1178, cited Petition, 10, as a "prohibition" of the 1947 purchase. That letter confirms that as of that date the Custodian had not yet taken jurisdiction, for Markham says a "change in the corporate structure * * * would necessitate the placing in the company of a supervisor * * *." Until Markham undertook "supervision," and notified the Treasury, he had not taken jurisdiction.[31] Supervision was first undertaken by Defendant himself in December, 1948. R. 7-8. Moreover, Markham wrote only that he would "disapprove of the sale *to the corporation* of any of the individually held shares;" no intimation was given that he would disapprove transfers between shareholders. Respecting this letter, Markham was asked below:

> "Did you intend by writing that letter to foreclose the purchase of stock of one shareholder by another shareholder. A. It doesn't say it here." R. 141

Bearing in mind the Custodian's approval of the 1943 purchase and the fact that no blocking order had been issued by 1947 after five years of "investigation", Plaintiffs can scarcely be blamed for believing that the Custodian had concluded that the sellers were not holding shares for the enemy.[32]

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[31] The Custodian would assume jurisdiction by issuing a "supervisory" order. Supervision was the analogue of "freezing" or "blocking" by the Treasury. If the Custodian issued a supervisory order, the Treasury, upon notification in writing from him, was required to "release all control" over the property. See §2 (f) of Executive Order 9095, as amended by Executive Order 9193, 50 U. S. C. App. §6, note. Section 12 of the order shows that a division of "jurisdiction" was involved.

[32] This Court has refused to "entrap" a petitioner because of "a total setting which understandably lulled this petitioner into misconception of the legal consequences of applying for exemption." *Moser* v. *United States*, 341 U.S. 41, 46.

VII. The Recoupment of Income Taxes

In objecting to the allowance by both courts of recoupment of income taxes paid by Plaintiffs on the dividends allegedly received as "cloaks", Defendant is attempting an unconstitutional double recovery and revealing still another unconscionable aspect of his claim.

Assuming the dividends to be "enemy" property, the bulk of the dividends were delivered to the United States in the form of taxes. The only "enemy" property retained by Plaintiffs is the residue, and it is this alone to which Defendant may lay claim.[33] A simple example will make this plain. Suppose Plaintiffs received $1000 in dividends on behalf of an enemy and paid $700 in income taxes thereon to the United States. All that the enemy could claim would be the balance of $300, particularly since Defendant himself argues that for "a successful cloaking of German ownership" "taxes had to be paid". Petition, 24.[34] The Custodian stands in the shoes of the enemy. *McGrath* v. *Dravo Corp.*, 183 F. (2d) 709 (C.A. 3). Though the government is at most entitled to $1000, it seeks by its counter-claim to collect the original $1000 and to retain the $700 for income taxes, or $1700 in all. Such contentions were rejected in the *Dravo* case, supra, and in *Gusman* v. *McGrath*, 94 F. Supp. 724, 726 (D.C. D.C.) on the ground that they would result in unjust enrichment.

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[33] The war power and the Act authorize the government only to confiscate the "property of a national of an enemy nation." *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 475; see also *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 485.

[34] The payment of income taxes is normally an indication of ownership. But, Defendant, ignoring requirements of fraud law, invariably prefers an interpretation of corruption rather than honesty. See Cross-Petition, 16.

Recoupment was allowed in *Bull* v. *United States*, 295 U. S. 247, 260, because the United States

> "took more than it was entitled to. Retention of the money was against morality and conscience."

In seeking equity on his counterclaim, Defendant, as the trial court held, must do equity. R. 86. Assuming arguendo that taxes were a part of the concealment scheme, nevertheless, as was said by Mr. Justice Holmes:

> "a man by committing a fraud does not become an outlaw and *caput lupinem*. He may have no standing to rescind a transaction but when it is rescinded by one who has the right to do so the courts will endeavor to do substantial justice so far as is consistent with adherence to law." *Stoffela* v. *Nugant*, 217 U.S. 499, 501.

Standard Oil Co. v. *Clark*, 163 F. (2d) 917 (C.A. 2), cited Petition, 25, is not to the contrary. The disallowance in that case to which Defendant refers involved an advance of $4000 by Development Co. to Duisberg of I. G. Farben on behalf of I. G. Farben. 163 F (2d) at 927-928. Development had no lien; the most it had was

> "a claim for money paid to the use of another, which cannot be enforced against this Defendant [the United States] or in this proceeding [to recover vested property]." Id. at 928.[35]

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[35] In another portion of the Standard Oil case cited by Defendant, the court *refused enforcement*. Here *Defendant* seeks enforcement of a counterclaim and Plaintiff merely asks recoupment.

Standard Oil, which had cloaked the 50% interest of I. G. Farben in Jasco, a jointly-owned company, falsely represented to a court in an anti-trust proceeding that it wholly owned Jasco and *caused certain patents held by it to be transferred to Jasco under a consent decree*. When the cloaking was discovered, Standard, in a suit under §9 of the Trading with the Enemy Act, asked the court to set aside the consent decree transfer to Jasco. This Court said:

> "* * * Now that their deception has been found out, they appeal to the conscience of a court to free them from the *pitfalls created by that deception. On this particular point*

As for the "Teapot Dome" cases, *Pan American Co.* v. *United States*, 273 U.S. 456, and *Mammoth Oil Co.* v. *United States*, 275 U.S. 13, cited, Petition, 24, 25, the Court there refused to allow a credit for the cost of improvements on oil leases procured through bribery on the grounds that

> "As Congress had not authorized them [the improvements], it must be assumed that the United States did not want the improvements made or was not ready to bear the cost of making them * * *. Whatever their usefulness or value, it is not for the courts to decide whether any of these things are needed or should be retained or used by the United States." 273 U.S. at 509-510.[36]

In other words, petitioners were volunteers seeking to recover for improvements which the United States "did not want," a far cry from this case where Plaintiffs paid taxes which, defendant argues, Plaintiffs had to pay and which the United States insists on retaining.

Finally, to insist upon a double recovery in a vesting case would be violative of the Fifth Amendment. This is the essence of *Cities Service Co.* v. *McGrath*, 342 U.S. 330. There petitioner resisted the government's claim to payment of vested debentures which were located outside the United States on the claim of exposure to additional liability in a foreign court. In the event of such liability, the Court held that

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> we think the defense of unclean hands is well taken." Id. at 935. Compare, supra, p. 30.

This, the Court emphasized,

> "is not a case of *affirmative* penalties visited upon them for their acts; rather it is *leaving them* [Plaintiffs] in the situation which they themselves have created." (Id. at 935)

[36] The same rationale was advanced for refusing a credit in Mammoth Oil: "The tanks, pipelines and other improvements put upon the reserve for the purpose of taking away its products were not authorized by Congress." 275 U.S. at 55.

> "petitioners will have the right to recoup from the United States, for a taking of their property in violation of the Fifth Amendment, 'just compensation' to the extent of their double liability. * * * We agree with the Court of Appeals that only with this assurance against double liability can it fairly be said that the present seizure is not itself an unconstitutional taking of petitioners' property." 342 U.S. at 335.

If there must be recoupment against the government when a second payment is made to a stranger, a fortiori recoupment is constitutionally required when the United States itself would otherwise by vesting obtain a double recovery from an American to which it is not entitled.

CONCLUSION

We welcome a grant of certiorari because we believe Defendant's administration of the "freezing control", of which this case affords only one example, to be so shocking as to call for this Court's supervision. For the protection of the public, his extension of freezing controls to Americans in the United States needs explicit rejection. Moreover, justice and law demand the overthrow of the untenable findings that Plaintiffs betrayed their country to the Nazis in time of war. Defendant's entire case rests on these findings. They are shot through with error, oblivious to the contemporary documents and based throughout on imputation of corruption in defiance of legal and constitutional requirements respecting burden of proof. See our cross-petition.

On the "conspiracy" score, we direct attention to the trial court's finding that in 1943 the Plaintiffs

> "were seeking to get the control of the company and it does not seem that they were doing that in the interest of the Germans." R. 85.

This finding of fact is uncontroverted. Plaintiffs do not have a split personality. They cannot on the one hand seize control for themselves in 1943, as the German justifiably feared they would, Cross-Petition (Appendix viii-ix) and on the other conceal German ownership of shares allegedly confided to them in 1939 to preserve German control.

Defendant's attempt to confiscate as enemy property shares purchased in reliance on his predecessor's assurance that Plaintiffs could do so, his attempt to secure a double recovery by claiming 100% of the dividends after 70% had been paid to the government as income taxes, are not alone legally untenable—they are unconscionable. We ask this Court to remind him that

> "We naturally look to the action of a sovereign state, to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals." *Woodruff* v. *Trapnall*, 10 How. 190, 207.

Respectfully submitted,

RAOUL BERGER
Attorney for Respondents

Of Counsel:
ABE KRASH

APPENDIX

The members of Congress were repeatedly assured in unmistakable terms that the First War Powers Act, 1941, had no applicability to Americans.

Mr. Summers:

"* * * This is simply a section dealing with alien enemies."

Mr. Kean:

"If it deals only with alien enemies, I think it is perfectly all right."

Mr. Summers:

"I believe *there is no doubt* about that." 87 Cong. Rec. 9859.

* * * *

Mr. Springer stated:

"As I understand, the gentleman [Mr. Kefauver], has stated that subsection (b) of Section 301 *applies only to nationals of a foreign country* who have an interest in property in this country."

Mr. Gwynne:

"Yes; I think *that is clear.*" *Id.* at 9863.

Representative Gwynne of Iowa was a member of the Subcommittee that considered the bill. *Id.* at 9856.

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FILED
JAN 9 1953

IN THE

Supreme Court of the United States

October Term, 1952

No. 542

PAUL WM. VORT, ERNEST NAUEN, and
PAUL WILLIAM VORT and JULIAN BASCH
as Trustees, u/w of FRED BASCH, Deceased,
Petitioners

v.

JAMES P. McGRANERY,
Attorney General of the United States

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WILSON - EPES PRINTING CO. - RE 7-6003 - WASHINGTON 1, D. C.

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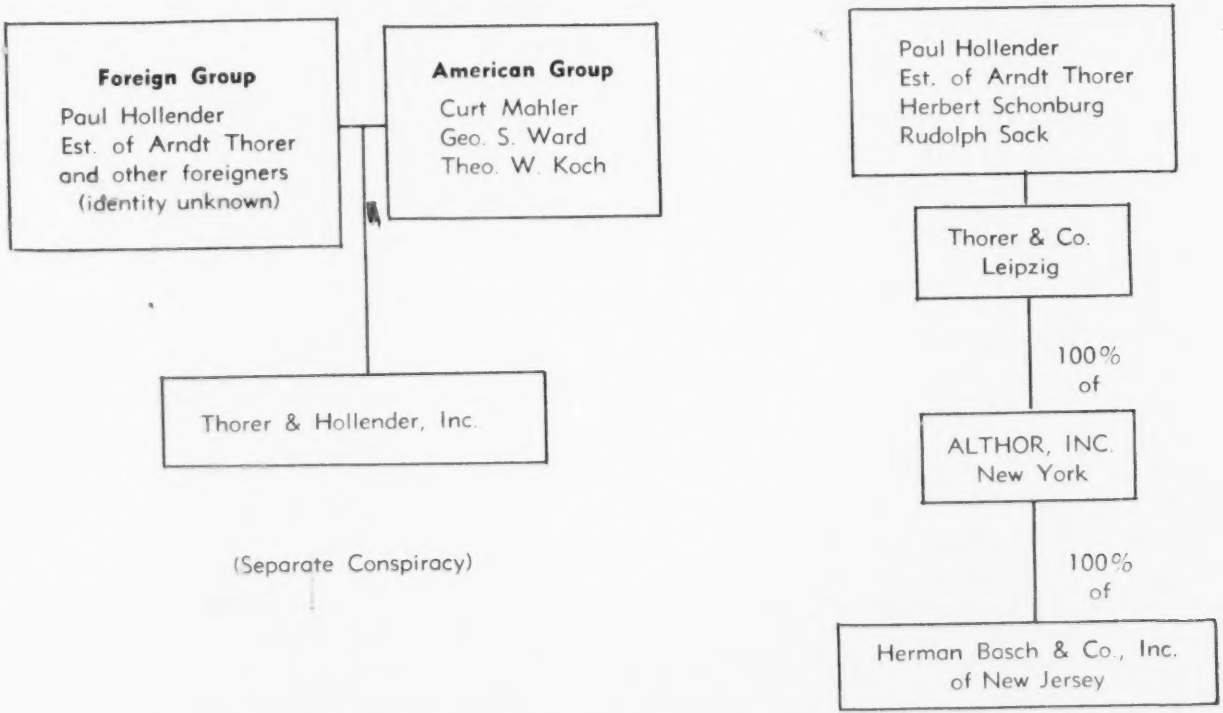

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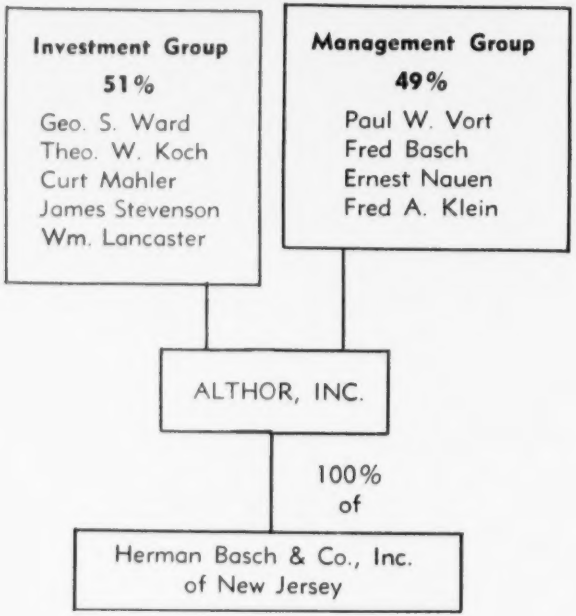

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IN THE

Supreme Court of the United States

October Term, 1952

No. .....

PAUL WM. VORT, ERNEST NAUEN, and
PAUL WILLIAM VORT and JULIAN BASCH
as Trustees, u/w of FRED BASCH, Deceased,
Petitioners

v.

JAMES P. MCGRANERY,
Attorney General of the United States

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Cross-Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming *per curiam* an order of the United States District Court for the District of Columbia which in part denied a return of certain securities vested from Cross-Petitioners by Respondent.

Opinions Below

The opinion of the District Court, R. 75, is reported in 99 F. Supp. 57; its supplemental opinion is printed at R. 86. The opinion of the Court of Appeals, R. ....., is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered October 13, 1952, R. ..... The jurisdiction of this Court is invoked under Section 1254, Title 28, U.S.C.

Questions Presented

1. Whether the allowance of interest on vested funds from the date such funds were vested by Respondent conflicts with this Court's decision in *McGrath* v. *Manufacturers Trust Co.*, 338 U.S. 241.

2. Whether, after making a turnover of the vested property to Respondent, required by the Trading with the Enemy Act to be made without demur, Petitioners, in a suit to recover said property, to which the defense was a conspiracy to defraud, were properly burdened with proving themselves innocent of conspiring to defraud in view, first, of the due process guaranteed by the Fifth Amendment, and, second, of the settled presumption that one charged with fraud acted honestly.

3. Whether charges of a conspiracy to defraud the United States by concealing enemy assets, which result in the confiscation of American property and stigmatize American citizens, must be proven by clear, unequivocal, and convincing evidence, and whether such proof was made in the instant case.

4. Whether evidence of a "separate" conspiracy, in which, the trial court found, Petitioners did not participate, which evidence said court refused to strike, was prejudicial to petitioners.

STATEMENT OF THE CASE

On December 22, 1948, Respondent (hereinafter Defendant) vested 1,442 shares of Herman Basch & Co., a New Jersey corporation, from Cross-Petitioners (hereinafter Plaintiffs) and others on a finding that they belonged to Thorer & Co., a German partnership, R. 5. Plaintiffs, Paul William Vort, Ernest Nauen, and the trustees of the estate of Fred Basch, American citizens and residents, brought suit in the District Court for the District of Columbia under Section 9(a) of the Trading with the Enemy Act, 50 U.S.C. App. §9(a), to recover 810 of the vested shares on the ground that they are the owners thereof. R. 2, 9, 12. Defendant answered that Plaintiffs acquired the shares pursuant to a conspiracy to defraud the United States by concealing the beneficial interest of Thorer & Co. in order to preserve the stock from seizure by the United States in the event of war with Germany, R. 17, 24. Defendant also vested the dividends received by Plaintiffs on the 810 shares and filed a counterclaim demanding such dividends, R. 24. The District Court awarded 402 shares to Plaintiffs, permitted Defendant to retain 408 shares, and directed Plaintiffs to pay Defendant the dividends on the 408 shares retained, less deductions for Federal income taxes paid by Plaintiffs. R. 87-88. Plaintiffs were also ordered to pay interest from the date of vesting on the dividends less the tax credit. R. 86, 88. On appeal and cross-appeal, the Circuit Court of Appeals for the District of Columbia Circuit affirmed the judgment per curiam.[1]

The case arose out of a sale at Trenton, New Jersey, on February 18, 1939, when Thorer & Co. transferred all of the shares of Althor, Inc., an American holding com-

[1] Defendant has filed a petition for certiorari from so much of the judgment as is unfavorable to him.

pany which held 100% of the shares of Herman Basch & Co., Inc., (see chart) at $200 per share, R. 111, as follows:

Forty-nine percent (49%) were allocated to a "management" group comprising Plaintiffs Vort and Nauen, and Fred Basch, now deceased (succeeded by Vort and Julian Basch, Trustees and Plaintiffs). R. 99. They had managed Basch & Co. for many years, were indispensable to its operations, *infra*, p. 20, and paid with their own moneys. See Appendix, ii-v. Of this 49%, 24% was sold subject to an option by Thorer & Co. to repurchase at 10% above the selling price, R. 1149-1150, and 25% was sold to them free and clear. Only their optioned shares were vested from Plaintiffs.[2]

Fifty-one percent (51%) of the shares were transferred, subject to the repurchase option, to an "investment" group comprising Theodore W. Koch, a cousin of Paul Hollender (a Thorer & Co. partner); Curt Mahler, a shareholder and director of Thorer & Hollender, an American corporation dealing in furs owned by some of the Thorer & Co. partners; and three attorneys for the Thorer interests, George S. Ward, William W. Lancaster, a partner of Shearman & Sterling, the New York law firm, and Lancaster's associate, James A. Stevenson, R. 109-110, 448-449. See chart. This group had not participated in running Basch & Co., R. 152.

In addition to the repurchase option, there were executed at Trenton cross-options among the shareholders, running first to members of the 51% group with respect to the stock held by them and to members of the 49% group with respect to their stock, R. 695, 1115. All of

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[2] Of the 500 outstanding shares, 245 were sold to Plaintiffs, of which 120 or 24% were subject to option. Plaintiffs allotted 18 of their 120 optioned shares to Fred Klein, attorney for the Herman Basch estate and for Fred Basch, R. 208, 239, 373, retaining 20.4% optioned shares, all of which were vested.

the shares, including the unoptioned 25%, were put into escrow, R. 1110, 1113, 1114.

Prior to Trenton, Mahler had cabled Hollender to allocate

> "less than half should go to the crown princes [i.e., Plaintiffs, *infra*, p. 19]; the rest to people here *whom you can really trust.*" R. 1232. (Emphasis supplied throughout).

The trial court found that 51% of the shares

> "was held by Ward and his associates who acted principally for the Germans, who wished to be sure of retaining the control." R. 81.

Koch, Hollender's cousin, testified that had Plaintiffs been given control in 1939, the Germans

> "never again would be able to get control", R. 431-432.

On December 13, 1940, after approximately six weeks of negotiations by Ward, Koch, and Hollender, about which Fred, Vort and Ernest were not advised, the repurchase option held by Thorer & Co. was terminated in writing for a valuable consideration, R. 1028; see Appendix, x-xii.

In correspondence between Hollender and the 51% group, various proposals were made either to exclude Plaintiffs from the release of the options or to burden them with the major part of its cost. See *Ibid.* The former existence of this repurchase option and its termination were reported to the government in October 1941, R. 1203-1205, 760. The cross-options and the escrow were terminated respectively in September and October 1941, and the shares were delivered to the shareholders, R. 1035-1036, 166, 266. These were the last claims of any kind on the shares, R. 168, 175; cf. R. 322, 699. Throughout plaintiffs paid federal income taxes on dividends received on the shares they held. R. 174, 701.

REASONS FOR GRANTING THE WRIT

I.

1. The Attorney General has independently petitioned for review of that portion of the judgment below which is unfavorable to him. If his petition be granted, review must encompass the entire case. For he conceded in the court below that if the trial court's findings respecting Plaintiffs' participation in the 1939 conspiracy were set aside, his appeals respecting certain stock purchases made in 1943 and 1947 (involved in his petition for certiorari) "go by the board." Appellant's Reply Brief, 4, in the court below. Those findings are therefore at the root of his case. This Court will scarcely indulge in gratuitous far-reaching propositions of law upon the basis of erroneous factual findings. Correction of the erroneous findings of fact will also make unnecessary a decision of grave constitutional issues that arise if the decision below on the 1943-1947 case is controverted. A grant of defendant's petition, we submit, will require that the entire case be reviewed, and that our petition also be granted.

2. Whether or not the Attorney General's petition is granted, we submit that our petition should be granted because it presents large questions of public importance. True, the constitutional and grave legal issues involved require a look at the findings of fact, affirmed *per curiam* below. But this Court has emphasized that

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." *Niemotko* v. *Maryland*, 340 U.S. 268, 271.

Then, too, the requirement that fraud be proved by "clear, unequivocal, and convincing" evidence (infra, fn. 18)

"would be lost if the ascertainment by the lower courts whether that exacting standard of proof had been satisfied on the whole record were to be deemed a 'fact' of the same order as all other 'facts', not open to review here." *Baumgartner* v. *United States*, 322 U.S. 665, 671.

This case *does not involve the resolution of conflicting testimony.* It turns on the fact that the trial court, in violation of settled principles, completely ignored the contemporary documents and the deposition testimony of the alleged accomplices, all of which exonerated Plaintiffs,[3] in favor of startling inferences wrested from equivocal facts.[4] The vast bulk of the evidence came before the trial court in depositions or documents[5] which contradict his surmises. See Appendix.

II.

The decision below is *squarely in conflict with the ruling of this Court* in *McGrath* v. *Manufacturers Trust Co.*, 338 U.S. 241, 249. The Court below affirmed the trial

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[3] Contrary to the usual case, in which co-conspirators are "prodded into accusing or contradicting each other," *Krulewitch* v. *United States*, 336 U.S. 440, 454 (Jackson, Frankfurter, and Murphy, JJ., concurring).

[4] If contemporaneous documents cannot be overcome by oral testimony, *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395, how can they be overcome by inferences from equivocal facts?

[5] The testimony of Ward, Koch, Mahler (who alone exchanged the alleged "conspiratorial" letters with each other and with Hollender) and of Stevenson, Percus (a C.P.A. and auditor of Basch Co., R. 288, 297) and Schlotterer (Defendant's Nazi expert on "cloaking" infra, p. 17) was taken by Defendant in depositions. The transcript of record (excluding the summation) totalled 3,419 pages, of which 1,508 pages were oral testimony and 1,911 pages were deposition excerpts or exhibits. In addition, 598 exhibits comprising some 1,250 pages were introduced. Hence about three-fourths of the total evidence before the trial court was written.

court's ruling allowing interest on dividends vested from Plaintiffs "from the date of the vesting of the dividends," R. 86. This Court held flatly to the contrary:

> "We find no authority in that [Trading with the Enemy] Act for a 6 percent rate or for any other rate of coercive interest to be added as an incident to a summary order for the transfer of possession of funds."

Failure to correct this obvious error casts doubt upon the adequacy of review below.

III.

1. The court below *decided an important question of Federal law* which has not been, but *should be, settled by this Court.* It approved the trial court's imposition of the burden of disproving conspiracy and fraudulent concealment of enemy ownership upon Plaintiffs as a condition of recovery after they had been compelled to turn over the vested property without demur. This is a question of large importance in the administration of the Trading with the Enemy Act and affects all claimants for the return of vested property thereunder.

Even though the owner of vested property is an American citizen and the victim of a mistaken vesting, he is required by the Act to turn over his property to the Attorney General without demur, *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554. Deprived of his normal right to defend,[6] the owner is forced to become an involuntary plaintiff to recover his property. The Act has been construed to impose on the claimant the burden of

---

[6] "Before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts." *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190, 199.

proof, i.e., of ultimate persuasion.[7] The trial court throughout imposed that burden upon Plaintiffs,[8] *infra*, pp. 11-14.

A citizen cannot be burdened, after making the required turnover, with disproof of charges that he fraudulently held the property in behalf of an enemy. He can no more be compelled to prove his innocence in order to recover his property than to preserve his life or liberty. Having gagged his objections to the capture, the government cannot shift the burden of proving a citizen's wrongdoing by the trick of postponing the hearing until a turnover is made.

The denaturalization cases make plain that the government cannot evade the burden by procedural maneuvering. Wher the government seeks to denaturalize a citizen, it must prove by "clear, unequivocal, and convincing" evidence that he obtained his naturalization certificate illegally, *Knauer* v. *United States*, 328 U.S. 654, 657. To be sure, in such proceedings the government as plaintiff bears the traditional burden of the affirmative. But the burden does not shift when the government is *defendant*. So, if an individual interned as an enemy alien and threatened with deportation brings suit for a declaratory judgment that he is a citizen, the government as defendant has the burden of proving that citizenship has been lost:

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[7] *Von Zedtwitz* v. *Sutherland*, 26 F. 2d 525, 526; *Sinjen* v. *Miller*, 281 Fed. 889, 891 (D. Neb.); *Draeger Shipping Co.* v. *Crowley*, 55 F. Supp. 906, 912 (S.D. N.Y.)

[8] Plaintiffs discharged the burden of going forward by proving payment with their own funds (see Appendix, ii-v), possession of the shares, R. 166, recordation in the corporate books, and payment of taxes on the dividends, R. 174, 701. These are the accepted techniques for proving title to securities. The burden of proving fraud, that is to say, German ownership, should properly have rested upon Defendant, who pleaded that defense, R. 17, 20, 24.

> "the government carries the same heavy burden in both situations"

for the reason that

> "annihilation of the right is equally disastrous • • • in one case as in the other." *Bauer* v. *Clark,* 161 F. 2d 397, 401 (C.A. 7).

Surely the government can no less escape the burden when it seeks to confiscate the property of a citizen than when it seeks to denaturalize a foreign-born citizen. If the rights of an American citizen are at stake

> "It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime," *McFarland* v. *American Sugar Co.,* 241 U.S. 79, 86.

Although our case is a civil action, the sanctions—confiscation plus a stained reputation—are comparable to criminal penalties, and the principle is no less applicable, as *Cummings* v. *Missouri,* 4 Wall. 277, 330, a civil action, attests. There, when inhabitants of the Confederate states who sought to carry on their profession as priests and clergymen were required to take an oath that they had never been in armed hostility to the United States or manifested adherence to its enemies, this Court, quoting Alexander Hamilton, labelled it

> "*a subversion* of one great principle of social security, to wit; that every man shall *be presumed innocent until he is proved guilty.* This was to invert the order of things; and, instead of obliging the State to prove the guilt, in order to inflict the penalty, it was *to oblige the citizen to establish his own innocence to avoid the penalty.*"

It is likewise a "subversion" to compel an American to prove innocence of "cloaking" as a condition of recovering property taken from him by the strong hand.

2. The trial court's *imposition of the burden* of proving themselves innocent of defrauding the United States upon Plaintiffs was likewise *a departure from the accepted and usual course of judicial proceedings*, and that departure was sanctioned by the appellate court's per curiam affirmance of the trial court's decision. It violated the presumption "that the plaintiff acted honestly and in good faith," *Michels* v. *Olmstead*, 14 Fed. 219, 221 (W.D. Mo.) and the settled rule that

> "if the motive and design of an act may be traced to an honest and legitimate source equally as to a corrupt one, the former ought to be preferred." *United States* v. *Arredondo*, 6 Pet. 691. 716.[9]

Throughout the trial court wrested inferences of corrupt intent from equivocal facts.

3. Limitations of space prohibit a recital of every resolution of doubt by the trial court against Plaintiffs. A few examples must suffice.

(a) Respecting the vested shares subject to repurchase option, the trial court was asked during the summation for the Plaintiffs:

> "Did the plaintiffs ever learn from anyone that the Germans were using the option against a contingency of war?
> "The Court. The question is whether a man of any common sense would not know that when he acquired the option [in February, 1939].
>
> • • • •
>
> "I do not think it is the burden of the government to do more than *establish a prima facie case* and, as I say, the option itself raises a prima facie case of conspiracy." R. 994.

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[9] See also *Davis* v. *Commissioner of Internal Revenue*, 184 F. 2d 86, 87 (C.A. 10); *Public Motor Service* v. *Standard Oil Co.*, 99 F. 2d 124, 126 (App. D.C.)

This substituted the wisdom of hindsight [10] for a necessary finding of fraudulent intent and was also wrong as a matter of law. It was held with respect to a repurchase option that

> "fraud cannot be inferred * * * from acts legal in themselves and consistent with an honest purpose." *Budd* v. *Commissioner of Internal Revenue,* 43 F. 2d 509, 512 (C.A. 3)

(b) Though expressly absolving Plaintiffs of any *participation* in the *separate* cloaking conspiracy respecting Thorer & Hollender, R. 81, 86 (see chart), the trial court found that because some Thorer & Hollender directors sat on the Basch board, it was "incredible" that Plaintiffs

> "were not cognizant * * * of the plan to cloak Thorer & Hollender * * *." R. 81, 86.

Think of imputing to a Sears-Roebuck director knowledge of a Montgomery Ward conspiracy merely because a Ward director sat on the Sears board! More important, the Thorer & Hollender directors, Ward, Mahler, and Koch, as well as Stevenson and Percus, repeatedly testified during their *depositions* that Plaintiffs were never advised nor consulted about any plans dealing with Thorer & Hollender.[11]

---

[10] Chamberlain returned from Munich on October 1, 1938, with "Peace in our time." On August 3, 1939, Sir Thomas Inskip, a member of the British cabinet, said that

> "War today is not only not inevitable but is unlikely. The Government have good reason for saying that." *New York Times,* August 4, 1939, p. 1, col. 1.

The trial judge endowed obscure furriers with a prescience denied to statesmen.

[11] R. 258, 272, 297, 308, 315, 316, 352, 356, 378, 382, 384, 385, 389, 404, 405, 420, 425, 437-438. The former government investigator, Bliss, testifying for Defendant, said that he found not a single letter to or from Plaintiffs respecting the sale of Thorer & Hollender in all of the files of Ward, Koch, Mahler, et al., that he searched, R. 895. Plaintiffs were never shareholders, officers or employees of Thorer & Hollender.

(c) The trial court found that the cancellation of the option in December 1940

> "was gone through *evidently* to prevent the seizure of the stock by the United States, *it being apparent* that the United States and Germany were near to the breaking off of their relations and resulting war," R. 83.

On October 31, 1940, President Roosevelt said:

> "I have said this before, but I shall say it again and again and again. Your boys are not going to be sent into any foreign wars." *New York Times,* October 31, 1940, p. 1, col. 8; p. 14, col. 3.[12]

(d) The trial court found that the cross-options were terminated (in September, 1941) to avoid Treasury reporting requirements, R. 84. Defendant conceded in the court below that "the reporting requirements of Treasury were ambiguous." Cross-Appellee's Brief, 50. The fact is that no reports of the cross-options were required.[13] Assuming an ambiguity, the court must resolve the doubt in favor of, not against, one charged with fraud.[14] The

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[12] On October 30, Joseph Kennedy, Ambassador to England, said that he "sees no war involvement" and declared that the United States could not be drawn into war "at any stage or under any conditions," *New York Times,* October 30, 1940, p. 8, col. 3.

[13] Treasury required a report, first, of property owned as of June 1940 by foreign nationals. R. 1203-1206. The German repurchase option and its cancellation were reported in response to this requirement in October 1941, R. 1203-1204. Next, the Treasury required the report of interests in the reported German property, i.e., in the option, owned by Americans, R. 1205. A cross-option held by an American on shares held by an American was not an American interest in the German option and therefore required no reporting.

[14] It is no crime to violate an ambiguous regulation, *M. Kraus & Bros.* v. *United States,* 327 U. S. 614, 621. Hence alleged noncompliance therewith can scarcely be stamped as fraudulent. This Court recently declared that

> "words which are vague * * * may be as much of a trap for the innocent as the ancient laws of Caligula." *United States* v. *Cardiff,* 21 L. W. 4045, 4046 (December 8, 1952).

contemporary documents show that treasury reporting requirements had nothing whatever to do with the cancellation. App. xii.

(e) The trial court drew a sinister inference from the fact that the cross-option cancellations, executed in August 1941, "were pre-dated to January 1941." R. 84. But the cancellation recites that it is "dated *as of* January 2, 1941," R. 1033. The "as of" floodlights the pre-dating. Parties intent on fraud would scarcely red-flag the fraud. And, to be effective as a fraud the pre-dating had to reach behind June 1, 1940, because the Treasury required a report of German interests existing on that date, as Ward well knew, R. 1270. Hence the pre-dating "*as of* January 2, 1941" could not have been devised to avoid freezing control requirements.

Additional examples, sprinkled through the Appendix, show that the trial court throughout resolved all doubts against Plaintiffs, patent error in a fraud case, and demanded that they prove their innocence of conspiracy and fraud, a denial of due process.

IV.

The court below *sanctioned departures* by the trial court from the accepted and *usual course of judicial proceedings* which are so grave as to call for the exercise of this Court's supervision.

1). The trial court erroneously considered and refused to strike evidence of a "separate" Thorer & Hollender conspiracy, R. 81, 86, in which members of the 51% may or may not have been implicated. He imputed knowledge of that "conspiracy" to Plaintiffs because some Thorer & Hollender directors sat with them on the Basch board, *supra*, p. 12. But he expressly found that Plaintiffs "were not participants in the Thorer & Hollender conspiracy." R. 86. Nevertheless, over repeated objec-

tions, he admitted, and finally refused to strike, a vast amount of testimony bearing on this *separate conspiracy*, including the settlement and dismissal with prejudice of a suit brought by certain Swedish interests to recover the vested shares of Thorer & Hollender, Def. Ex. 264 (unprinted), which, without more, was prejudicial error.[15]

Mere knowledge of a conspiracy without participation therein does not constitute one a conspirator.[16] Since Plaintiffs did not participate in the "separate" Thorer & Hollender conspiracy, the admission and consideration of that evidence was prejudicial as to Plaintiffs. This Court as held in *Kotteakos* v. *United States*, 328 U.S. 750, 774, saying that

> "the dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial rights has not taken place."[17]

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[15] Assuming participation in the separate conspiracy, it is reversible error to admit a plea of guilty by one conspirator in a subsequent proceeding against another conspirator, *United States* v. *Hall*, 178 F. 2d 853 (C.A. 2).

Compare the rule that a

> "conviction of an alleged fellow conspirator after a trial is not admissible as against one now being charged," *United States* v. *Toner*, 173 F. 2d 140, 142.

[16] *United States* v. *Russell*, 41 F. 2d 852, 853 (S.D. Ala.); *McDaniel* v. *United States*, 24 F. 2d 303, 305 (C.A. 5); *Di Bonaventura* v. *United States*, 15 F. 2d 494, 495 (C.A. 4); *Commonwealth* v. *Beal*, 314 Mass. 210, 222, 50 N.E. (2d) 14, 21.

[17] See also *Canella* v. *United States*, 157 F. 2d 470, 476 (C.A. 9); *Marconte* v. *United States*, 49 F. 2d 156, 158 (C.A. 10); *Tinsley* v. *United States*, 43 F. 2d 890, 893 (C.A. 8).

There is a fundamental similarity between principles of civil and criminal conspiracy. Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393, 425 (1922); Cousens, *Agreement as an Element of Conspiracy*, 23 Va. L. Rev. 898, note 1 (1937). Mr. Justice Jackson (concurring with Frankfurter and Murphy, JJ.) referred to the

> "interchangeable use of conspiracy doctrine in civil as well as penal proceedings * * *," *Krulewitch* v. *United States*, 336 U.S. 440, 451.

The trial court's repeated stress upon Plaintiffs' alleged knowledge of this separate conspiracy, and his refusal to strike it, show that he attached great weight to it.

2). We consider next grave *departures from the usual course of proceedings* with respect to the alleged conspiracy to defraud by concealing ownership of the Basch Company shares.

Proof of fraud in alien property "cloaking" cases, as in all other fraud cases, must be by "clear, unequivocal, and convincing" evidence.[18] This Court has held, where denaturalization is sought on the ground of *fraud*, that

> "the standard of proof required is strict. We do not accept even concurrent findings of two lower courts as conclusive. * * * We reexamine the facts to determine whether the United States has carried its burden of proving by 'clear, unequivocal, and convincing evidence', which does not leave the issue in doubt * * *," *Knauer* v. *United States*, 328 U.S. 654, 657.

The crushing weight of the decision below exceeds that of a denaturalization judgment. Plaintiffs—Jews in a Jewish industry, R. 102, 274, 324, who have special reason to cherish the blessings of American citizenship—are accused of concealing Nazi assets during wartime to shield them from seizure by our own government. They are accused of traitorous conduct, of betraying to the hated Nazi enemy the country that had sheltered and enriched them. When charges of fraud result in confiscation and infamy,[19] compliance with the standards of "clear, un-

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[18] Fraud "must be shown by clear and convincing evidence * * * and by evidence which is not equivocal, that is equally consistent with either honesty or deceit," *Public Motor Service* v. *Standard Oil Co.*, 99 F. 2d 124, 126 (App. D.C.); *Lackawanna Pants Mfg. Co.* v. *Wiseman*, 133 F. 2d 482, 486 (C.A. 6)

[19] Compare the exclusion "from public employment on disloyalty grounds" which "has become a badge of infamy". *Wiemann* v. *Updegraff*, S.Ct. Dec. 15, 1952, 21 L.W. 4057, 4059.

equivocal, and convincing" proof is imperative. We shall show that

> "the case made out by the Government lacks that solidity of proof which leaves no troubling doubt in deciding a question of such gravity • • •," *Baumgartner* v. *United States*, 322 U.S. 665, 670.

The case fairly bulges with shattering, not merely "troubling," doubts. Space limits us to a few highlights.

(a) Germans could not cloak their American assets without Nazi approval, R. 440. Schlotterer, the former Nazi official who was required to approve "cloaking," R. 440, 442, testifying for Defendant, said the Nazi party would not tolerate the employment of a Jew as a cloak, that a Jew was considered "absolutely unreliable," and that no Jew was ever employed as a cloak, R. 447-448. Hollender had incurred the enmity of Alfred Rosenberg, the notorious Nazi chieftain, R. 448; he would not have dared to run counter to this prohibition. Even the Ministry of Economics, said Schlotterer, could not go against the Nazi party opinion respecting Jews, R. 446, for the Nazi party "would have gone to the highest authorities to prevent" the employment of a Jewish cloak, R. 448. Vort and Fred were Jews.

(b) That Hollender did not in fact run counter to this prohibition is underscored by his contemporary letters. As a prelude to approval of the 1939 sale, the Reichsbank, wrote Hollender to Mahler, must be satisfied that vendees who obtain a majority, R. 1158, and who

> "give an option for repurchase to the German firm are absolutely reliable, i.e., in other words, that in the Basch case also, *you, Ward, and Koch will be investigated as to whether you would represent* the German interests in every way. That will be done through the Embassy and/or the Consulate General in U.S.A. • • •." R. 1159.

Shown this letter, Schlotterer agreed that the Ministry was interested only in Ward, Mahler, and Koch, and not in Plaintiffs, R. 446, proof that Plaintiffs were written off as "absolutely unreliable" from the very outset.

Hollender wrote Koch on January 22, 1939:

> "Althor: *Although the Reichsbank does not like* that proposition with Fred, Paul and Ernst, almost 50% *real* shareholders I think we could get final agreement under the force of the situation," R. 1154; see also Appendix xi.[20]

Thus, the Nazis sharply distinguished between Plaintiffs, who purchased under a "real" sale, and the "majority" whose "absolute reliability" was to be assured by Embassy investigation. Yet the court below stamped as cloaks Jews whom Hollender dared not employ, and the Nazis would not tolerate, in that role.

(c) The deep-seated hostility between Plaintiffs and the German vendors precludes an inference of conspiracy. In the words of Mr. Justice Jackson (concurring):

> "no person planning a crime would accept as a collaborator one on whom he thought he could not rely for help if he were caught * * *," *Krulewitch* v. *United States*, 336 U.S. 440, 455.

The distrust had its inception when the Germans entered Basch & Co. in 1932 by way of a settlement compromising certain litigation. Defendant stated in the court below that:

> "Vort and Fred Basch had opposed the 1932 settlement, and were disappointed by the transfer to the

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[20] The "force of the situation" was recognition of the necessity for obtaining consent to any sale from the Basch estate, which would have refused approval to a transfer that did not include Vort and Fred, and of the fact that a breach with Vort and Fred, the indispensable management, would lead to disclosure of German ownership long hidden from the trade, *infra*, p. 19-20.

> Germans because Vort, who handled the office work and sales and Fred Basch who handled the dyeing, had counted on inheriting the business from Herman Basch who was childless." Cross-Appellee's Brief, p. 3.

Henceforth the Germans derisively referred to Plaintiffs as the "crown princes," R. 308, 309, 335, 387. As late as June of 1938, Hollender wrote Ward that Fred and Vort were "just waiting for a reason to take H. B. & Co. back," R. 1096, as could happen on default under the 1932 agreement, R. 286; Plaintiff's Ex. DJ-W 581, par. 14 (unprinted). Ward prodded Hollender to appoint Vort and Fred as officers "to satisfy the trade" in view of the Jewish anti-Nazi boycott, R. 1211; they were appointed officers in 1937 but, as Ward wrote Stevenson, they were not to be allowed to sign checks, R. 1093. Stevenson testified that Plaintiffs were "hostile" and "antagonistic" to the Thorer interests. R. 273

Vort and Fred had repeatedly sought to buy Basch Co. shares, R. 272, 323, 102, Transcript 595 (unprinted). On March 8, 1938, Hollender wrote Ward that such an acquisition "is out of the question," R. 386. Their last attempt was rebuffed on October 21, 1938, when Schoenberg, a Thorer partner, objected to selling them any voting stock because "even if only being minority shareholders" they might "raise difficulties by their minority voting stock," R. 1099. Yet the trial court found that men not trusted to *buy* shares in normal course in October 1938 were confided in February 1939 with the shares *without consideration* by the Germans as fiduciaries in a criminal scheme.

Why, it may be asked, was it necessary for the Germans to sell to Vort and Fred at all. First, the backdrop of the Trenton sale was a boycott by American Jews against German-owned firms. R. 250-251, 443-444; Appendix vi-viii. The fur trade is 99% Jewish-owned, R. 102,

324, and knowledge that Basch was German-owned would have spelled certain destruction of the business, R. 402, 103. Representations had been made to the trade that the Basch interests held the shares. Appendix, vi-vii. Were Vort and Fred to sever their connection with the firm, the German interest and the prior misrepresentations would have been revealed, and the business destroyed, R. 402. The Germans hoped to salvage an interest through their 51% "friends" and through exercise of their option after the boycott had quieted. It was to their advantage to preserve a going business. Without Plaintiffs, this was impossible. Second, it was repeatedly testified, Fred and Vort were indispensable to the company because of their know-how and trade relations. R. 274, 322, 402, 349, 391, 225, 199, 208, 283, 256. Without them, Stevenson testified, the "business would have come to a standstill," R. 274, and, as Ward stated, the 51% group would have been "helpess," R. 349. Third, under the 1932 agreement, the Thorers could make no disposition of their Althor shares without the consent of the Basch estate, and such consent would of course not be forthcoming to a sale that left Fred and Vort high and dry. R. 334, 286, 429; Pl. Ex. DJ-W 581, par. 24 (unprinted). Ward cabled Hollender of this on January 16, 1939, R. 1103; see R. 1225. Hence the Germans and their American representatives made the best of a bad bargain.

FACTUAL SUMMATION

There are no "conspiratorial" communications to or from Plaintiffs. Appendix, vii, fn. 3. Such communications were confined to Hollender and the 51% group. The latter repeatedly testified that Plaintiffs were never advised of these communications or of Hollender's plans. Ibid.

The trial court included Plaintiffs in the conspiracy on the basis of incredible inferences: for example, execution of the repurchase option in February, 1939, was prima facie fraudulent because a man of common sense should have known that it was Hollender's hedge against impending war, Supra p. 11. The trial judge concluded that because Plaintiffs joined in representations to the Jewish anti-Nazi Committee in January, 1939, that there was no German ownership, they must have conspired to conceal it from the United States after Pearl Harbor, though they paid for the shares in February, 1939, with their own money in a sale which at every turn exhibited the long-standing hostility of the sellers. Appendix, ix-x.

Should the Court be interested in the merits, a number of crucial findings are refuted by contemporary documentation in the Appendix. As a final sample, we shall merely mention the fantastic inclusion in the conspiracy of William Lancaster, long-time partner in the noted law firm of Shearman & Sterling, because his associate returned after the Trenton sale and gave him 17 of 35 shares received as a retainer. On this basis, the court concluded that Lancaster betrayed his country for a paltry $3,400. See Appendix i-ii.

CONCLUSION

The record cries aloud for reversal for failure to comply with the settled rule that fraud must be proven by "clear, unequivocal, and convincing" evidence. We ask the Court to reaffirm the constitutional requirement that a citizen can no more be compelled to prove himself innocent in order to regain his property than to regain his liberty.

Mr. Justice Jackson, quoting Sayre, *Criminal Conspiracy,* 35 Harv. L. Rev. 393, 427, has reminded us that conspiracy has proven

> "the evil genius of our law wherever it has touched it." *Krulewitch* v. *United States,* 336 U.S. 440, 451.

Hence this Court has been ever vigilant to protect an accused against

> "unwarranted imputation of guilt from others' conduct." *Kotteakos* v. *United States,* 328 U.S. 750, 777.

Here the erroneous conspiracy findings carry consequences little less crushing than exile or imprisonment.

> "It is a miserable thing to be despoiled of all one's fortunes: it is more miserable still to be so unjustly * * *. It is a calamitous thing to be stripped of one's goods, more calamitous still if accompanied by disgrace." I Cicero, *Orations,* pp. 34-35 (Yonge trans., 1921).

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

Documentary Refutation of Crucial Findings

We here demonstrate palpable error in (1) the inclusion of Lancaster in the conspiracy, and in the findings (2) that plaintiffs did not use their own money for the purchase; (3) that the price paid was insignificant; (4) that the conspiracy to defraud the United States was merely a continuation of the "conspiracy" to mislead the boycott committee; (5) that the acts performed at Trenton carried the badge of fraud, and (6) that termination of the repurchase option and of the cross-options was fraudulent.

1. William Lancaster, for 30 years a partner of the noted law firm of Shearman & Sterling, R. 449, betrayed his country, the trial court concluded, for a paltry $3,400,[1] R. 450.

Counsel for defendant recognized in his summation that Lancaster was not at Trenton, never saw any documents about the matter, got all his information secondhand, and as a matter of fact, did not actually know most of the Trenton participants, R. 999; R. 454-455. Lancaster met Hollender in 1932 on legal business, turned him over at once to Stevenson, and saw him only once or twice thereafter, R. 449. The first he knew of the shares he purchased was when Stevenson returned from Trenton and told him that he had been paid a retainer in advance, had purchased therewith 35 shares, and allocated 17 to Lancaster, R. 254, 450, 458. Neither retainers in advance nor repurchase options in closed corporations were unusual in Lancaster's experience, R. 450-451; the sum of $3,400 was

[1] On summation, it was argued that "to hold the plaintiffs are conspirators, you have to hold Lancaster to be a conspirator, and I submit that it is inconceivable. The Court: I do not think it is inconceivable at all." R. 1001.

relatively insignificant to Lancaster and he paid little attention to the shares thereafter, R. 450. He did not know of the cross-options, R. 457, and did not participate in the negotiations for termination of the repurchase option, R. 458. Nevertheless, Defendant vested from Lancaster the proceeds of the shares he sold to Vort in 1943, R. 454, and the trial court did not find it "inconceivable" that he conspired. R. 1001.

2. The District Court erroneously found that Plaintiffs paid for their shares with money of the German vendors, R. 80-81. Since Plaintiff's used their own money, the cloaking charge is without precedent in 30 years of alien property litigation. Given the history of animosity between the parties, cross-petition, 18-19, it is inconceivable that Plaintiffs would have reached into their own pockets in behalf of the Germans. Plaintiffs rely for proof that payment was made with their own money upon contemporaneous records and written statements by third parties and upon undisputed facts. Since all of the oral testimony supported plaintiffs, the findings must rest upon the documentary evidence or be without basis.

A. Background Facts

(a) The earliest suggestion of a sale which would include the "Crown Princes" was cabled by Mahler to Hollender on January 19, 1939, R. 1232. On January 22, Hollender cabled his "tentative agreement" provided the "crown princes," were reduced below 49%, R. 1103. We shall demonstrate that all of the monies in question belonged to plaintiffs, before these cables were sent.

(b) Plaintiffs paid for their shares with deposits kept with Basch & Co. It is undisputed that from 1934 onward it had been the practice of the firm's officers to leave earnings and bonuses on deposit with the company to draw interest. The uncontroverted summaries from

books of the company produced in court so showed, R. 1016-1018; see R. 142-143, 303.

(c) A portion of the deposits were bonuses. Plaintiffs, as managers of Basch & Co., over the years received two different bonuses: (a) a percentage "of the annual net profits" under their employment contract known as the per centage bonus, R. 1283, 143, 292; and (b) additional annual bonuses, paid since 1936, known as the "cash" or "special" bonuses, R. 1016, 1018, 292, 143.

B. Breakdown of Purchase Monies

Plaintiffs paid $45,400 drawn from their deposits for 227 shares.

(a) The company books showed that in October and mid-December, 1938, weeks before the February Trenton sale, Vort and Fred Basch were each paid $3,000, or a total of $6,000, in settlement of a controversy over the 1937 "cash" bonus, R. 819, 144, 149-150, 1016, 299. Defendant did not dispute that these monies belonged to plaintiffs.

(b) The 1938 percentage bonuses, due Vort, Basch, and Nauen as of December 31, 1938, under their contract of employment, as defendant conceded below, R. 996, cf. R. 821, were $7,844, $3,176, and $7,844 respectively, a total of $18,864, R. 1016-1018. This sum, plus the $6,000 adjustment, *supra*, totals $24,864. At Trenton, the Germans sold 125 shares at $200 a share to Plaintiffs, free of any repurchase option. The total of $25,000 was just a few dollars more than the $24,864. These 125 shares have never been vested, a tacit admission by Defendant that they belong to Plaintiffs and that their own funds were used as purchase money.

(c) The dispute, therefore, centers around the balance of the purchase money, namely, the 1938 "cash" or "spe-

cial'' bonuses totalling $21,000. Defendant concedes below that special bonuses ''had been given in prior years,'' Cross-Appellee's Brief, p. 37. Vort and Fred Basch received ''cash'' bonuses of $5,000 each in 1936, $7,000 (as adjusted) in 1937, R. 1016-1018. The 1938 bonus to each of $7,500 was thus in line with the customary "cash'' bonus of previous years, and we are entitled to presume was no less in due course.

The contemporary documents show the 1938 "cash" bonus was approved by the German vendors weeks before they considered including Plaintiffs in a sale. On December 6, 1938, Ward cabled Hollender that the Basch & Co. 1938 net profit would be

> "eighty-three [thousand] before legal expenses cash bonuses." R. 1161

On December 15, Ward cabled

> ''estimated gain eighty-three will be reduced to about sixty after cash bonuses legal fees." R. 1162.

Hollender confirmed the ''cash'' bonuses on December 16:

> ''We know the $83,000 H. B. & Co. will be diminished by about $20,000.'' R. 1189.

A Basch & Co. Board Minute of December 27, 1938, impliedly authorizes the cash bonus by declaring a $60,000 dividend after providing for bonuses, Pl. Ex. Pl-P2 (unprinted); R. 301. This was precisely the way the unchallenged 1937 bonuses were authorized, R. 1167.

There is additional corroborative evidence. The company ledger in court showed that on December 30, 1938, Vort withdrew $7,500 from his deposits, R. 597, precisely the amount of the 1938 cash bonus, compelling the inference the bonuses were authorized prior thereto. Mahler, who first suggested inclusion of the "crown princes" as vendees on January 19, 1939, there cabled that they have ''about $50,000,'' R. 1232, approximately the sum of their

balances with Basch & Co. One last singular fact. At Trenton, Vort and Ernest were a bit short of the full purchase price. They borrowed $55 and $623, respectively, from the company, which they repaid in February and July, 1939, R. 689, 1074, 665, 1085, 796. Why these repayments if the Germans were advancing their own monies?

In sum, the contemporaneous documents establish that Plaintiffs paid for the shares with their own funds, received before the Germans even entertained the thought of selling to them. In deciding that all the shares, *including the unvested stock,* were purchased with German money, R. 81-82, the trial court galloped beyond the most partisan claims of Defendant.

3. The trial court found that the price of $200 per share paid by plaintiffs "was almost insignificant as compared with its real value," R. 82. Unquestionably the price of $200 per share for the 25% sold to plaintiffs free and clear was low. They obtained these shares cheaply because as Ward, Hollender's confidant and attorney said, without them "we would be helpless," R. 349; See cross-petition, p. 20. Hollender regarded the sale of the 25% as a "sacrifice" he was "forced" to make to preserve the company, R. 1245, 1121, 401-402. Since this 25% was not vested, the low price thereof cannot be regarded as a badge of fraud.

The remaining, optioned shares were worth little more than $200 for they were subject to an option to repurchase at $220, R. 1149. Who but a mad man would pay $500 for a share he was required to resell at $220? An option agreement is recognized

> "as restricting the market value of stock in the hands of the owner to the option price." *Lomb* v. *Sugden,* 82 F. (2d) 166, 168 (C.A. 2); *May* v. *McGowan,* 194 F. (2d)396, 397 (C.A. 2).

4. In equating concealment from the Jewish anti-Nazi boycott committee in 1939 with a scheme to conceal from the United States after Pearl Harbor, the trial court went fundamentally astray. To protect the company from the boycott, representations were made to the trade in 1936-1937 that the Germans had sold their shares to the Basch Holding Co., a firm owned by the Basch estate, R. 200, retaining only an option unlikely to be exercised, R. 249, 1171.

In January 1939, after fresh Nazi outrages, R. 443-444, the boycott committee asked Basch Co. for written statements of non-German ownership, R. 1232. To lend credence to the earlier representations, a certificate for 500 shares of Basch Co. was made out to Basch Holding Co., and an option giving the Germans right of repurchase was prepared. Both were dated 1936; both were fictional; both were designed solely for exhibition to the boycott committee to save the company from destruction by the outraged Jewish trade, R. 218, 201-202, 249, 250, 253. All of these facts were laid before the trial court by plaintiffs. From this, the trial court concluded that:

> "being engaged in that conspiracy to conceal ownership from the Boycott Committee, my idea is that it was a continued conspiracy to conceal the German ownership." R. 992.

Self-defense to preserve the company from an unlawful boycott by a self-constituted lynching committee (however understandable its indignation) does not amount to a "conspiracy." The fatal error of the trial court, however, was to assume *continuation* of a "conspiracy". *Before* Trenton, plaintiffs concealed German ownership from the Boycott Committee; *after* Trenton, where they purchased the German shares with their own money, they concealed only the repurchase option. Disclosure of the option was withheld from the Boycott Committee, not because plaintiffs made a "sham" purchase but because

it would have discredited prior misrepresentations to the fur trade that the Germans were long since ousted. Moreover, what was suppressed from the Committee was disclosed to the United States in 1941 when Plaintiffs, complying with the freezing control regulations, reported the option and its cancellation to the Treasury. R. 1204, 760. Readiness to deceive the Boycott Committee does not, therefore, show the slightest intent to defraud the United States.

The trial court transmuted this "conspiracy" to mislead the boycott committee in 1939 into a conspiracy to defraud the United States because

> "Paul Hollender at this time was very apprehensive of approaching war between the United States and Germany. * * * the whole cloaking would be as available in concealing the true ownership of the stock from the United States as from the committee." R. 79.

Let it be assumed that Hollender intended a sham sale. The uncontradicted deposition testimony by Ward, Mahler and Koch, with whom Hollender corresponded, was that Hollender's fears of war or the plans to circumvent war seizure were never communicated to plaintiffs,[2] R. 388, 421-422, 251-252, 311-312.[3] A seller's uncommunicated,

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[2] In civil cases (as in criminal):
"Conspirators are chargeable with the acts of their fellows *only* if the acts are done in the furtherance of the *joint venture* as *all understood it;* they *are not to be held* for what some of the conspirators, *unknown* to the *rest,* do beyond the reasonable intendment of the common understanding," *Momand* v. *Universal Film Exchange,* 72 F. Supp. 469, 475 (Mass.) aff'd 172 F. 2d 37 (C.A. 1); *Winkler-Koch Engineering Corp.* v. *Universal Products Co.,* 79 F. Supp. 1013, 1018 (S.D. N.Y.)

[3] Ward, Koch, Stevenson, Mahler, Percus—one and all—testified repeatedly that no copies of the supposedly incriminating letters were sent to petitioners, that they were never consulted about the plan of the Germans to dispose of either Basch Co. or Thorer &

subjective intent is not controlling. *Restatement of Contracts* §20; *Hotchkiss* v. *National City Bank*, 200 Fed. 287, 293 (S.D. N.Y.) (per L. Hand). Stevenson, the Shearman & Sterling associate, testified that

> "The background of the sale was the pushing of Fred Basch and Paul Vort to get the Germans out on account of this boycott situation." R. 250; See R. 104, 251, 323, 393, 1190, 306; Transcript 1001 (unprinted).

So far as plaintiffs knew, the Germans at Trenton capitulated under the pounding of the Boycott to plaintiffs' long repeated demands for ownership.

5. Driven by the absence of "conspiratorial" communications to or from plaintiffs, by their complete exoneration at the hands of their alleged accomplices, supra, fn. 3, defendant was forced to take the position in his opening statement in the trial court that:

> "The case largely stands or falls on what happened there [at Trenton]." Transcript, 23-24 (unprinted).

"What happened at Trenton?" First, control was denied to plaintiffs. The trial court found that 51% of the shares

> "was held by Ward and his associates who acted primarily for the Germans, who wished to be sure of retaining the control." R. 81.[4]

Hollender, or about anything other than the narrow managerial duties they performed in connection with Basch Co., and that contents of the letters were never communicated to Vort, Fred, and Ernest. R. 258, 272, 289, 297, 308, 311-312, 315, 316, 320, 353, 355, 356, 357, 359, 378, 381, 382, 384, 385, 388, 389, 390, 403, 404, 405, 406, 407, 410, 420-422, 425-426, 437-438, 683, 690-691, 853, 855-856, 927-928. See Bliss, cross-petition, p. 12, fn. 11.

[4] Both Ward and Stevenson testified on deposition that the sellers would not let Vort and Fred have control because they did not trust them, R. 258, 259, 350. Mahler said it would have been "dangerous" to have Fred and Vort "run the whole show," R. 310. See Cross-petition, p. 19.

Second, Schoenberg, a Thorer partner, reported to Hollender after Trenton that he had "awful difficulties" with plaintiffs, R. 1121, who had fought for 66% of the shares at Trenton, R. 1120. This fight for 66% was senseless if plaintiffs were merely to conceal the interest of the Germans. Third, the shares were put in escrow with members of the 51% group, R. 1110. Stevenson explained that the escrow was designed to ensure that plaintiffs would produce the shares if the Germans chose to exercise their option, R. 276; cf. R. 1237. Since plaintiffs were not even trusted to honor their option, how could they be trusted as cloaks in a criminal conspiracy?[8] Fourth, to perpetuate the control of the 51% group, the stock was subject to one set of cross-options running first to 51 percenters and another set running first to 49 percenters. R. 695, 1115. Ward testified that these cross-options were designed to keep control out of plaintiffs' hands, R. 394. Fifth, prior to Trenton the Germans had permitted Vort, Fred Basch and Ernest Nauen to constitute the majority of the board, for as shareholders the Germans controlled the situation. R. 767-768, 603. But at Trenton, Ernest was thrown off the board; R. 722; the board was split, 3 directors going to the 51% and three to the 49%, R. 603, and the by-laws were changed so that four votes were required for affirmative action. R. 1247. This, Ward contemporaneously explained to Hollender, was so that the 51% could "curb" the "activities" of the 49%, R. 1247.

In sum, "what happened at Trenton" was of a piece with what happened before and after Trenton; it exhibited the undeviating hostility to and distrust of petitioners by the Germans. These facts preclude a finding

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[8] Defendant admitted that Vort declared at Trenton that the Germans would never exercise the option, Cross-Appellee's Brief, p. 53. If Vort was making a sham purchase, the remark was meaningless.

that plaintiffs were included in a "conspiracy" between the Germans and the 51%.

6) The repurchase options were cancelled in December, 1940. R. 1028. The trial court erroneously found that the cancellation was designed to escape seizure as a result of then "imminent" war between Germany and the United States. See Cross-petition, p. 13. The fact is that it was not Hollender's fear of war, but his need of money, that produced the cancellation.[6] Plaintiffs knew nothing of the secretly conducted cancellation negotiations by Ward, Koch, Mahler and Stevenson, as is shown by the proposals which excluded or disproportionately burdened plaintiffs.

On October 26, 1940, Koch wrote Stevenson that the entire price of the cancellation should be unloaded on plaintiffs because their shares were to be "released," i.e., freed from the option.[7] Hollender, however, was unwilling to release the shares of plaintiffs and cabled Koch:

> "We are ready to sell you, George [Ward] Jimmy [Stevenson] our option." R. 1264.

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[6] Defendant stated in the court below that Hollender was "under constant pressure from the German government to bring foreign exchange into Germany." Cross Appellee's Brief, 42. On November 8, 1940, Ward cabled Hollender: "previously remitted all that is due stop further remittances can be made only * * * for sale option." R. 1262. Koch wrote Ward on November 24, 1940: "apparently now he [Hollender] needs $70,000 instead of the original $30,000 * * *." R. 1263.

[7] Cancellation, wrote Koch, "would release 125 shares of stock to Paul, Fred and Ernest, and for this reason they be requested to supply the $25,000 or whatever figure would be paid to secure cancellation of the option." R. 1261. Ward wrote Koch on November 20, 1940, that Mahler objected to termination of the option because "he is not very agreeable to Paul and Fred's getting a larger interest in the company." R. 1262. That is to say, cancellation meant enlargement of the "free" shares plaintiffs would own.

Several days before the cancellation agreement was effectuated, Hollender again cabled Ward, insisting that

> "cancel option provided * * * 24% bought by friends * * * perhaps with help of loan on 51% * * *." R. 1264.

These 1940 instructions to the 51% to *buy* the plaintiff's 24% optioned shares show that the 1939 *sale* to plaintiffs of these shares *was real.*

True, the price of $63,000 for the cancellation was paid out of dividends declared by Basch Co. The dividends on the option free, unvested 25% unquestionably belonged to plaintiffs. And until the option was exercised,[8] the dividends on the optioned shares belonged to plaintiffs. *Martindell* v. *Fiduciary Council,* 133 N.J. Eq. 408, 30 A. (2d) 281, 284 (1943); see also R. 210. This is corroborated by the fact that a disproportionate share of the cancellation price was loaded on plaintiffs, as Koch had earlier proposed, Supra. Defendant conceded that Ward (and the other members of the 51% group) paid $128 per share for the cancellation, whereas Ernst Nauen "for each optioned share * * * paid $261." Cross Appellee's Brief, 48. Vort and Fred Basch each held 39 optioned shares; each paid $11,392, or $292 per share, R. 614. In short, plaintiffs, after long wrangling,[9] were compelled to pay 2½ times as much for the cancellation per optioned share as did the 51% group. Plaintiffs' bitter fight over, and Hollender's insistence on, this levy is incomprehen-

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[8] The trial court erroneously found that "the Germans could have exercised their option" in December, *1940,* R. 83. Defendant agrees that it was "exercisable according to its terms on or after December 31, 1942." Cross Appellee's Brief, 19, fn. 14.

[9] Koch testified that plaintiffs "put up an awful kick", R. 436. Stevenson testified that Vort was "incensed" at this demand, R. 260. Ward said there was an extended argument and great difficulties with Vort on this score, R. 359, 362, as well as with Ernest; see also R. 159, 609, 705, 753.

sible if the dividend plaintiffs used belonged to the Germans. Defendant himself furnished the explanation:

> "The bargain price for the 125 shares [$200 per share for the 'free' shares at Trenton] may well explain why in 1940 the plaintiffs paid for the cancellation of the Thorer option on a basis measured by their 'free' shares as well as the 'optioned' ones * * *. It must have seemed not unfair to the parties that those who had been permitted to buy $600 shares for $200 should make an *additional contribution.*" Cross Appellee's Brief, 64, fn. 48.

In making an "additional contribution" for reasons of fairness, plaintiffs patently used their own, not German, monies.

7) The cross-options were cancelled in September, 1941, R. 1035. The trial court's erroneous finding that the termination was designed to avoid Treasury reporting requirements, R. 84, has been earlier refuted. Cross-Petition, pp. 13-14. The contemporary documents show that the real reason for the termination was Vort's insistence on replacing the old cross-options which excluded him from control by new across-the-board options that would enable him to get control. The contemporary documents show that Vort continuously pressed for termination of the cross-options from mid-December, 1940, onward. R. 1134, 1267, 1135, 1136, 1268, 416. Space limits citations to Ward's letter of June 20, 1941, to Koch stating that Vort was "quite anxious" to terminate the escrow, obtain the stock certificates and replace the restricted group options with across-the-board options, which would make possible a shift of control to the 49%, R. 1269. Koch resisted. He wrote Stevenson on August 27, 1941 (R. 1136), that under the proposed new cross-option were a 51% member to die,

> "control would go to the management group. * * * Where would we be if the management group got

> control * * *. The most important thing about any new option agreement is that it definitely assures continued control by the investment group." R. 1137.

Koch prevailed. He reminded Ward on November 22, 1941, of the stormy September meeting where Koch

> "objected to the pro rata options all around on everybody's stock and we agreed it would be better to have no options at all." R. 1036; see also R. 1138, 419.

The record fairly bulges with corroborative contemporary documents and deposition testimony which can not because of space limitations be here detailed. That evidence underscores the innocence of plaintiffs at every step.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 542

PAUL WM. VORT, ERNEST NAUEN, and PAUL WM. VORT and JULIAN H. BASCH, as Trustees, u/w of FRED BASCH, Deceased, *Petitioners*

v.

JAMES P. MCGRANERY, Attorney General of the United States, as Successor to the Alien Property Custodian

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On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court filed on April 11, 1951 (R. 75-86) is reported at 99 F. Supp. 57. The supplemental opinion filed on May 1, 1951

(R. 86-87) is reported at 108 F. Supp. 263. The *per curiam* opinion of the Court of Appeals (R. 1302) is reported at 199 F. 2d 782.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1952 (R. 1304). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the concurrent findings of fact by the lower courts that petitioners were not the beneficial owners of 408 shares of stock in Herman Basch & Co. and therefore not entitled to a return under Section 9(a) of the Trading with the Enemy Act were clearly erroneous.

2. Whether that Act validly imposes upon a claimant the burden of establishing his right, title and interest in vested property.

3. Whether there was error in awarding interest to the Government upon dividends which petitioners were found to be holding for the benefit of Germans.

STATUTES INVOLVED

The relevant portions of the Trading with the Enemy Act, as amended, are set forth in the Appendix to the petition for a writ of certiorari in No. 541, this Term, pp. 28-34.

STATEMENT

The cross-petition for a writ of certiorari is chiefly devoted to an attack on the correctness of the findings of fact made by the District Court and affirmed by the Court of Appeals from which the courts concluded that petitioners were not the beneficial owners of 408 shares of stock in Herman Basch & Company and accordingly were not entitled to their return under Section 9(a) of the Trading with the Enemy Act. We here summarize the facts which we believe clearly support the conclusions reached below.

It is not disputed that before the purported sales in 1939, Thorer & Company, a German partnership, owned all of the 500 shares of Althor, Inc., a holding company, which, in turn, owned all of the stock of Herman Basch & Company.

In 1937, a Jewish Boycott Committee engaged in an attempt to stop all dealings with German-owned firms, or firms which dealt with Germans. The Basch Company was suspected of being German owned; therefore, to ward off a possible boycott, petitioner Vort and Fred Basch (the trustees of whose estate are among petitioners here), among others, stated orally and in writing to the Committee that the Company was not German owned, and that there was only an option running to the German Thorer & Company, not ~~exercisable~~ exercisable until 1942, and then only on such onerous terms that it would never be exercised. These represen-

tations, which are now admitted to have been false (Cross-Pet. App. p. vi), were, for a time, accepted. In the later part of 1938 and early January, 1939, the Boycott Committee demanded documentary proof that the Basch Company was not German owned (R. 1232). A conference was held on January 19, 1939, in which petitioner Vort, Fred Basch, and petitioner Nauen participated, and to support the story that the company was owned by the Basch estate and that the Thorers held only an option, an admittedly fictitious stock certificate showing American ownership and a fictitious option in favor of Thorer & Company were executed. Both were dated back to November, 1936 (R. 1105-6, 249).

During the same period, Paul Hollender, a partner in the German Thorer & Company, began to fear that the heightened political tension between Germany and the United States might lead to seizure of German assets in America (R. 1217, 1254). Conferences were held and letters written in which Americanizing the Althor company was discussed (R. 370, 1229-1244), and these culminated in a Trenton, New Jersey, conference in February, 1939.[1] Herbert Schoenburg and Otto Nauen came over from Germany to represent

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[1] The plan used at Trenton was laid out in a letter by Ward to Hollender and Mahler, dated January 27, 1939 (R. 1233-1240). That letter makes plain that the transaction was sham.

the seller, Thorer & Company; the purchasers—Vort, Ernest Nauen, Fred Basch, Ward, Mahler, Koch, Stevenson and Klein—all participated in the 3-day conference with the Germans (R. 326, 417, 562).

At Trenton, the 500 shares of Althor, Inc. were purportedly sold to Vort (89 shares), Fred Basch (89 shares), Ernest Nauen (49 shares), Klein (18 shares), Ward (95 shares), Koch (95 shares—70 for Curt Mahler) and Stevenson (65 shares—30 for Mahler). The price was $200 a share. 125 shares were sold outright; 50 to Fred Basch, 50 to Vort, and 25 to Nauen.[2] The remaining 375 shares, including 102 taken by Vort, Basch, and Nauen, were sold subject to a repurchase option at $220 a share running to Thorer & Company (R. 1149). All of the 500 shares were placed in escrow (R. 1110), and all of the 500 shares were subject to cross-options (R. 1113) whereby no shares could be sold without first being offered to the other purchasers.

The total sale price of $100,000, or $200 a share was, as the District Court found, insignificant as compared to the real value of the stock. There was competent evidence that the book value of the stock in 1938 was $684.47 a share (R. 787) and that the stock earned $260.25 a share in that year, more than the sale price per share (R. 978-980). Even

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[2] These shares were not vested.

plaintiffs' accountant termed the price "ridiculous" (R. 979-980).

Vort acted before the Trenton conference and at said conference for himself and Fred Basch and Nauen, yet he never discussed the price to be paid for the shares (R. 539). Neither Vort nor Nauen made any financial analysis of any kind (R. 513, 547-548, 561). The price was set by Schoenburg, representing the sellers (R. 548), just as he imposed the conditions of the repurchase option, the cross-options, and the escrow (R. 163, 326, 548, 555, 708, 729).

Each purchaser received, in one form or another, money from the Basch Company or related companies in almost the exact amount required for his payments. Koch, who took 25 shares for himself, needed $5,000, and received $5,000 in bonuses or advances (R. 404-405, 423, 1125-1126). Stevenson, who took 35 shares (17 for his associate Lancaster), needed $7,000, and received $7,000 from the Basch Company for past and future legal services (R. 258). Ward, who purchased 95 shares, needed $19,000, and was paid $19,000 for legal services purportedly rendered to Thorer & Hollender dating back to 1932 (R. 327, 923, 1249). Mahler paid for the 100 shares which were purchased for him by drawing $20,000 out of the Basch Company (R. 578). Klein testified that he paid for his 18 shares with his own money, but he could not recall what bonuses, fees, compensa-

tions or dividends he received from Basch Company in 1939-40 (R. 233-235).

Vort, Basch, and Nauen paid for the 227 shares they purchased with their own checks, but were given Basch Company checks in the same amount, which were charged against their accounts with the company (R. 150-151, 687-689, 1073). The 102 "optioned shares" called for a payment of $20,400. Either at the Trenton conference or shortly before or after, Vort, Basch, and Nauen were given "special bonuses" totalling $21,000 (R. 576).

Thus substantially all of the money paid for the shares transferred at Trenton came initially from Herman Basch & Company. The District Court found (R. 80-81):

> The purchase price of the sale of stock came largely from dividends and bonuses from Basch & Company, part by means of advance payment for legal services; that which purported to be paid by the plaintiffs consisted of dividends and bonuses declared nearly two months after the close of business on December 31, 1938.
>
> * * * There seems to be *no doubt* that in fact the money purported to have been paid to the Germans was really their money either in Basch & Co. or Thorer & Hollender. [Italics added]

In April of 1940, after war had broken out in Europe, the United States instituted "freezing controls" against United States property owned by nationals of various European countries (Executive Order 8389, April 10, 1940, 5 F.R. 1400). Vort and Stevenson feared that controls would be extended to German property in the United States (R. 608, 610). Ward feared that the option might be seized (R. 328, 357-360). Whatever the reason, the parties negotiated with Paul Hollender, and in December, 1940 the stockholders ostensibly bought the German repurchase option. It was paid for as follows: On December 11, 1940, the Basch Company declared a $70,000 dividend to Althor, Inc., and it, in turn, after deducting $6,000 for taxes and expenses, declared a $64,000 dividend to the stockholders on December 12 (R. 1131-1132). On December 13, the option was cancelled upon payment of $64,000, $1,000 of which was deducted for expenses (R. 1266; 1132-33). Each stockholder paid $128 per share. Vort, Basch, and Nauen, who held 102 "optioned shares" and 125 "unoptioned shares," paid $128 on all of their shares whether optioned or unoptioned (R. 158, 612-15, 628-31, 752-753). The evidence showed that the stock was then worth $923.09 a share (R. 787), as compared with the option price of $220 a share.

Some of the stockholders complained of the increased tax rates brought about by the $64,000

dividend (R. 312-313, 365, 1267), and a suggestion was made that there be reimbursement by Althor (R. 1267). On January 31, 1940, less than two months after the first dividend, an additional and unusual dividend of $30,000 or $60 a share was declared by Althor (R. 622, 1267-1268).

The District Court found that this cancellation was fictitious, that German money was used, and that the Germans still remained in control (R. 82-83).

In August or September, 1941, the cross-options and the escrow agreement were terminated (R. 166) and the stock certificates were turned over to the individual shareholders in October (R. 166, 266). This transaction was predated to January 1941 (R. 1112, 1117).

The District Court found these cancellations were a continuation of the plan of concealment at a time when the stockholders were required to file affidavits with the Treasury that they were the true owners of the stock (R. 84).

In 1944, Althor was dissolved and its assets, the Basch shares, were distributed among its stockholders on a basis of 4 shares of Basch for 1 of Althor (R. 154-155).

ARGUMENT

1. This cross-petition raises, for the most part, only questions of fact which the District Court and the Court of Appeals have determined ad-

versely to petitioners. It is not disputed that the 408 shares of stock involved were German owned on February 17, 1939, nor is it disputed that record title to them was transferred to petitioners on February 18, 1939. The basic question is whether that transfer was bona fide or whether it was a sham transaction intended to conceal the continued German ownership. If it was a sham, as the courts below found, then it is well settled that petitioners may not recover. *Stoehr* v. *Wallace,* 255 U.S. 239, 251; *Standard Oil Co.* v. *Clark,* 163 F. 2d 917, 923 (C.A. 2), certiorari denied, 333 U.S. 873; *Kind* v. *Clark,* 161 F. 2d 36, 46-47 (C.A. 2), certiorari denied, 332 U.S. 808; *Beck* v. *McGrath,* 182 F. 2d 315 (C.A. 2); *Thorsch* v. *Miller,* 5 F. 2d 118 (C.A.D.C.), appeal dismissed, 274 U.S. 763; *Matheson* v. *Hicks,* 10 F. 2d 872 (E.D.N.Y.). This finding is fully supported by the record, the Court of Appeals found it to be supported by "substantial evidence" (R. 1302), and no useful purpose would be served by a re-examination of the evidence by this Court.

However, in view of the vigor with which petitioners attack the correctness of the findings below, we shall show that far from being "clearly erroneous" they were clearly correct.

At the outset it should be noted that this case does not present the broad question whether there was any "cloaking" at all of the Althor stock "sold" at Trenton. Petitioners do not seriously challenge

the finding that 51% of the stock purchased at Trenton was "cloaked" by other purchasers at the conference for the German vendors; indeed, in this Court they tacitly admit it. See e.g., "Factual Summation," Cross-Pet., pp. 20-21. So the real issue here is the narrow question whether it was error to include petitioners in that conspiracy. They claim error because there was evidence to show that they were not trusted by the vendors, or by the 51% group, that Jews (as were some of petitioners) were not allowed to "cloak", and that for years they, as the management group, had sought to own a part of the company. They also claim complete ignorance of the conspiratorial communications and any "cloaking" arrangement at Trenton, and that the contemporaneous documents absolve them.

Basically, however, there was nothing about the Trenton transaction, or the factors leading up to it, to stamp it as a genuine sale. It followed as a direct consequence of the fraudulent representations which for two years had been presented to the trade in an effort to hide the fact that the Basch Company was German owned.[3] It was admittedly consummated in secrecy. All of the conditions of

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[3] During this period the Basch corporate books were changed to hide any German connections. Money owing to Mahler was carried as "Accrued Expenses", because, as Vort testified, "we did not want to show that Curt Mahler had an account with us." (R. 577) Debts owing to Thorer & Company, the

sale, the "ridiculous" price, the repurchase option, the cross-options, and the escrow agreement were imposed by the German sellers. There was no arms-length discussion of price. And each purchaser received in one way or another from Basch & Co. almost the exact amount required to pay for the shares allotted to him. The repurchase option was bought and paid for by the simple expedient of declaring a dividend in the exact amount required. No distinction was made between optioned and unoptioned shares, each stockholder paying pro rata on all the shares held. An additional dividend was declared which reimbursed the stockholders for the taxes on the original dividend. The cross-options and escrow agreements were cancelled in September or October of 1941 just before the stockholders were required to make a report to the Treasury Department that they were the owners of the stock; these cancellations were pre-dated nine months. (See *supra*, pp. 3-9.)

In short, in the language of this Court, the sale:

> * * * was not prompted by commercial motives, nor based on an estimate of mutual advantages, and was not intended as a genuine business transaction, but was made to avoid

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German parents, were carried as "Sundry Loans Payable." (R. 678-679) Rebates paid annually to Thorer & Hollender, another American affiliate of Thorer & Co., were listed as "Sales Allowances." (R. 939)

> inconveniences which otherwise might ensue from a state of war; and that the parties intended to leave the beneficial ownership in the German corporation and not pass it to the New York corporation. * * * On no other theory can the acts of those who were concerned be explained or their declarations reconciled. [*Stoehr* v. *Wallace,* 255 U.S. 239, 251.]

Petitioners contend, however, that the trial court erred in drawing adverse inferences from the fraud practiced by them on the Boycott Committee, although they do not deny that they participated in that fraud and that, only a month before the Trenton conference, fictitious documents were prepared for the purpose of concealing the German ownership of the Basch Company. But this Court has held that when "a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct toward another, at about the same time, and in relation to a like subject, was actuated by the same spirit." *Butler* v. *Watkins,* 13 Wall. 456, 464. And in *Hodgskin* v. *United States,* 279 Fed. 85, 93 (C.A. 2), a World War I Trading with the Enemy Act case, it was held that "the defendants' efforts by suppression of truth, if not the suggestion of falsehood, to convince one particular enemy of Germany that Heyden was not German-owned and German-controlled, was relevant and material

evidence of long established purpose and intent." See also *Standard Oil Co.* v. *Clark,* 163 F. 2d 917, 924 (C.A. 2), certiorari denied, 333 U.S. 873, referring to "other known instances of practical deception by Jersey as to the legal devices employed, such as concealment from English interests * * * or like concealment from Jersey's cooperating domestic companies" as relevant to the issue whether certain 1939 transfers were sham. The intent of the parties at the Trenton conference was a basic question in this case, and the trial court found that "apart from every other consideration they [petitioners] were willing, in order to acquire the stock, to continue to join in the conspiracy and assist in protecting the German interest" (R. 81).

Petitioners also contend that they were not consulted about the sales prior to the Trenton conference and that the contemporaneous documents absolve them. Yet Vort attended a conference on February 1, 1939, at which the "sale of Thorer interest" was discussed (R. 1181-1182), and also one on February 16 concerning "this contemplated sale". (R. 370) And on January 19, 1939, Mahler outlined the transaction in a cable (R. 1232) and he testified he must have obtained the information from petitioners (R. 310-311).

In the final analysis, petitioners' real complaint is that the trial court did not give sufficient weight to the testimony which they claim absolved them

from any part of the "cloaking" transaction. But that is not reversible error, for an "appellate court may not reweigh the evidence or override the findings, except where it clearly appears they are manifestly wrong." *Nolan* v. *Werth,* 142 F. 2d 9-10 (C.A.D.C.). That is particularly true in a case such as this where the findings are "almost entirely concerned with imponderables, such as the intent of parties" to the transactions. *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 340, 342.[4]

2. In the circumstances of this case, there was no error in admitting evidence of the Thorer & Hollender conspiracy. The connections between Thorer & Hollender and the Basch Company were numerous and so close that evidence about the former company was necessary to clarify the facts about Basch. Paul Hollender was interested in both companies (R. 401) and Mahler was the manager of "T. & H." (R. 109). Thorer & Hollender was a large customer of Basch (R. 377) and received rebates from it (R. 162). Prior to

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[4] Contrary to the assertion of cross-petitioners (Cross-Pet. 7), this case did require the resolution of conflicting testimony. The contemporaneous documents implicated petitioners, as is shown *supra* p. 14. Both Vort and Nauen took the stand and testified extensively; both categorically asserted that the whole Trenton transaction was bona fide. Their testimony raised a conflict with the documentary evidence; and the trial judge disbelieved them. Their credibility was thus directly in issue.

the 1939 Trenton conference the Basch Company dividends were paid to Thorer & Hollender through Althor, Inc. and not sent directly to Germany (R. 193, 468-469, 475). The boycott involved both companies (R. 341). Mr. Markham, the then Deputy Alien Property Custodian, who was called as petitioners' witness, testified on direct examination that in his discussions with Mr. Cowen (see Petition for certiorari in No. 541, this Term, pp. 8-10, 11-23) the things said about Basch and about Thorer & Hollender were interwoven (R. 115) and that he thought the Thorer & Hollender people were getting out of Basch at the 1943 sale (R. 141). At the Trenton conference, $2,500 of the money put up by Koch came from Thorer & Hollender (R. 354). Ward's $19,000 also came from Thorer & Hollender and was charged on Thorer & Hollender's books to their Basch account (R. 911). Moreover, there was evidence that the $100,000 paid at Trenton for the stock was remitted to Thorer & Hollender (R. 312).

In any event, petitioners may not object to this evidence since it was they who first went into the matter (R. 107, 109, 115, 141, 162, 193, 297, 307, 467-469, 471, 475, and see plaintiff's Exhibits P-DJW-81 (R. 1097), P-DJW-191 (R. 1103-1104), and P-DJW-209a (R. 1107). That no prejudice resulted to the petitioners is shown by the careful way in which the District Court handled the matter. The court found that peti-

tioners knew of the conspiracy in regard to Thorer & Hollender, but that they were not participants in it (R. 86). It specifically ruled the evidence admissible to show that petitioners had knowledge that Ward and Koch were affiliated with the Germans in regard to the 1943 and 1947 sales (*ibid*).

3. Error is claimed in that the District Court imposed upon petitioners the burden of disproving fraud, and it is contended that the Trading with the Enemy Act is unconstitutional in imposing upon claimants to vested property the burden of proof. In petitioners' view of this case, it was incumbent upon the Government to prove by clear and convincing evidence that they engaged in a criminal conspiracy to defraud the United States in time of war. This assumes too much. Wartime seizures of enemy property are not penal. *Miller* v. *United States*, 11 Wall. 268, 305.

Section 9(a) of the Act, under which this action was brought, provides that any person not an enemy or ally of enemy "may institute a suit . . . to establish the interest, right, title, or debt . . . claimed, and if . . . established" the court will order a return. The constitutionality of this remedy, given to persons whose property has been erroneously seized, has been repeatedly sustained. *Becker Steel Co.* v. *Cummings*, 296 U.S. 74; *Garvan* v. *$20,000 Bonds*, 265 Fed. 477, 479 (C.A. 2), affirmed, *sub nom. Central Union Trust Co.* v.

Garvan, 254 U.S. 554; *Kahn* v. *Garvan,* 263 Fed. 909, 916 (S.D.N.Y.); *Salamandra Insurance Co.* v. *New York Life Ins. Co.,* 254 Fed. 852 (S.D.N.Y.). Under the statute, the issue in this case is thus, not only whether petitioners have been guilty of misconduct, but whether they beneficially own the property sued for. *Standard Oil Co.* v. *Clark,* 163 F. 2d 917 (C.A. 2), certiorari denied, 333 U.S. 873.

Since petitioners claim the beneficial ownership of the stock they must establish it. *Fujino* v. *Clark,* 172 F. 2d 384 (C.A. 9); *Farmers' Loan & Trust Co.* v. *Hicks,* 9 F. 2d 848 (C.A. 2), certiorari denied, 269 U.S. 583. The courts have uniformly held that the plaintiff in a Section 9(a) suit has the burden of proving beneficial ownership. In *Thorsch* v. *Miller,* 5 F. 2d 118 (C.A.D.C.), the plaintiff claimed to have purchased stock in an American corporation in March 1917, before the declaration of war. There was evidence indicating that the sale was not absolute but colorable and that as late as September 1919 the sellers considered themselves to be the owners. The court held (5 F. 2d at pp. 122-123) that "the burden of proof respecting the ownership of the stock rested upon the claimant" and that claimant had failed to discharge that burden. Accord: *Beck* v. *Clark,* 88 F. Supp. 565 (D. Conn.) affirmed, 182 F. 2d 315 (C.A. 2); *Draeger Shipping Co.* v. *Crowley,* 55 F. Supp. 906 (S.D.N.Y.); *Feller* v.

McGrath, 106 F. Supp. 147 (W.D. Pa.). The same rule applies in prize cases. *The Benito Estenger*, 176 U.S. 568; *The Amiable Isabella*, 6 Wheat 1; *The Jenny*, 5 Wall. 183.

In any event, what the District Court thought of the weight of the evidence, apart from any question of burden of proof, is shown in the opinion. The court found that "it is *clear* that the whole Trenton transaction was a sham and that the Germans still retained the control of the company," and that it was "*satisfied* that the cancellation of the options was fictitious and that the Germans still remained in control" (R. 82, 83). (Emphasis added.) Not only did the petitioners fail to "establish" their beneficial ownership, but the Government proved that the beneficial ownership remained in the Germans.

4. The award of interest to the Government (R. 88) was not in conflict with the decision of this Court in *McGrath* v. *Manufacturers Trust Company*, 338 U.S. 241. That case denied interest sought by the Custodian as a species of penalty for failure to comply with a Vesting Order, but it specifically recognized that the Custodian might be entitled to interest where it was due to the persons to whose rights he had succeeded. 338 U.S. at 248-249. That was the situation here. Petitioners, being in the position of trustees, as "cloaks," were accountable to the German former owners for interest if they dissipated the divi-

dends, comingled them with their own funds, or failed to invest them. *Buder* v. *Fiske,* 174 F. 2d 260, 274-275 (C.A. 8); *First National in West Union* v. *American Surety Co.,* 148 F. 2d 654 (C.A. 4); *Mades* v. *Miller,* 2 App. D.C. 455. Accordingly, if there was any error in the award of interest it was in failing to award interest from 1940.

CONCLUSION

The decisions of the courts below on the questions presented by the cross-petition are correct, are not in conflict with the decision of any other court, and do not call for review by this Court. Moreover, it will not be necessary in order to resolve the questions presented in the petition for a writ of certiorari in No. 541, this Term to go behind any findings of fact. Accordingly, the cross-petition should be denied, regardless of what disposition is made of the petition in No. 541.

Respectfully submitted,

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FEBRUARY, 1953.

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IN THE

Supreme Court of the United States

October Term, 1952

No. 542

PAUL WM. VORT, ERNEST NAUEN, and PAUL WM. VORT and JULIAN H. BASCH, as Trustees, u/w of FRED BASCH, Deceased, *Petitioners*

v.

JAMES P. MCGRANERY, Attorney General of the United States, as Successor to the Alien Property Custodian

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On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

CROSS-PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Defendant emphasizes that the trial court's findings were found by the Court of Appeals "to be supported by 'substantial evidence' (R. 1302)". Brief in Opposition, p. 10 (hereinafter Br. Opp.) That test in a fraud case was plainly wrong. There the test is

> "whether the United States has carried its burden of proving by 'clear, unequivocal and convincing evidence', which does not leave the issue in doubt * * *." *Knauer* v. *United States*, 328 U.S. 654, 657.

1) For the most part defendant merely restates the findings and ignores the contemporary documents which render them untenable. When he points to the "contemporary documents [which] implicated petitioners, as is shown supra, p. 14", Br. Opp. 15, fn. 4, he immediately betrays the hollowness of his case. At p. 14, defendant states:

> "Yet Vort attended a conference on February 1, 1939, at which the 'sale of Thorer interest' was discussed, (R. 1181-1182), and also one on February 16 concerning 'this contemplated sale'. (R. 370) And on January 19, 1939, Mahler outlined the transaction in a cable (R. 1232) and he testified he must have obtained the information from petitioners (R. 310-311)."

The February 1 citation is to a day note by lawyer Stevenson simply recording a meeting to disuss a sale. The equivocal nature of this note is underscored by Stevenson's deposition testimony that

> "the background of the sale was the pushing of Fred Basch and Paul Vort to get the Germans out on account of this boycott situation." R. 250. See also App. Cross-Petition, viii.

Respecting the February 16th meeting, defendant's citation (R. 370) is to Klein's testimony that he had a meeting with Fred Basch, Paul Vort and Mrs. Herman Basch to discuss the

> "contemplated sale of the stock. We wanted to know what effect it might have on the royalty agreement, because we feared that if the stock went into the hands of competitors we might be in difficulty."

Why should plaintiffs have feared a sale to competitors if all the plans of the Trenton transaction had been confided to them? Finally, Respondent refers to Mahler's cable of January 19, 1939, wherein "he outlined the transaction" and testified that "he must have obtained the information from petitioners." Supra, p. 2. The cited cable states in pertinent part:

> "New division of shares should be as follows less than half should go to Crown Princes rest to the people here whom you can really trust Stop First group has about $50,000—for second group part of the amounts mentioned by you can be used * * *." R. 1232.

At R. 310-311, cited by defendant, Mahler explained his phrase "first group has about $50,000" as meaning that

> "according to the cable they must have had this available in liquid form. * * * I apparently was assured by one of them [plaintiffs] that they could raise approximately $50,000."

Thus Mahler's cable shows on its face the line always drawn between the Crown Princes and those whom the Germans "can really trust". And it shows the same demarcation drawn in terms of the moneys to be employed to purchase the shares. The Crown Princes would employ their own $50,000, which they then had "available", the "second group", those who could really be trusted, were to use "amounts mentioned" by Hollender.

These pitiful few documents are all that Petitioner could muster in support of his assertion that "the contemporaneous documents implicated petitioners." Supra, p. 2.[1] In reading Respondent's Brief in Opposition, we

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[1] Ignoring our demonstration to the contrary, Appendix to Cross-Petition, p. x, defendant states (Br. Opp. 8) that

> "Vort and Stevenson feared that controls would be extended to German property in the United States. (R. 608, 610)."

At the cited point Vort testified:

> "Stevenson told us that there were rumors about that the United States was going to freeze foreign funds from Germany, and it might be a good opportunity for us to make a very beneficial arrangement to eliminate that re-purchase right * * *."

Patently, Vort did not "fear" freezing controls; he welcomed the possibility as affording leverage to terminate the re-purchase option.

ask the Court to bear in mind that defendant's repeated references to letters and negotiations will without exception prove to be communications which were not addressed to or confided in plaintiffs, or negotiations in which they did not participate. See App. Cross-Petition, x-xi, vii at fn. 3.

Respondent would wring from the plaintiff's participation in the representations to the boycott committee an inference that they meant similarly to deceive the United States. Br. Opp. 13.[2] First, plaintiffs made full disclosure in 1940 to the government of prior German ownership, a disclosure never made to the boycott committee. App. to Cross-Petition, vii. Second, any unfavorable inference drawn from the boycott representations must yield to the contemporary documents which show that

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[2] In this connection, defendant cites three facts:

"Money owing to Mahler was carried as 'Accrued Expenses' * * *. Debts owing to Thorer & Company, the German parents, were carried as 'Sundry Loans Payable'. * * * Rebates paid annually to Thorer & Hollender, another American affiliate of Thorer & Co., were listed as 'Sales Allowances'." Br. Opp. 11 at fn. 3.

Petitioners disclosed to the court that they were constrained in self-defense to make misrepresentations to the boycott committee. See Appendix to Cross-Petition vi-viii. The appearance on the books of substantial loans from Thorer & Company could only give rise to embarrassing questions by the boycott committee which had to be avoided in view of prior misrepresentations as to the cutting of German ties. The change of the account due Mahler, under a contract of employment, to "Accrued Expenses" was repeatedly explained as designed to forestall trade jealousy of the fact that Mahler, an officer of Thorer & Hollender, a fur dealer, enjoyed special privileges, which competitors would jealously view as a special rebate. See R. 530, 533, 255, 913-914, 1126. For the same reason it was felt essential to disguise the rebates to Thorer & Hollender. An inference of corruption is rebutted by the contemporary documents which show that repeatedly plaintiffs were excluded from the counsels of the Germans with the 51% group respecting proposed concealment from the United States. App. to Cross-Petition, vii-viii.

plaintiffs were in fact excluded from the plans of the Germans to conceal from the United States. *Ibid.*

Our "real complaint" is not, as defendant suggests, that "the trial court did not give sufficient weight to the testimony which they claim absolved them * * *". Br. Opp. p. 14. We complain that the trial court based its findings on incredible inferences drawn from at best equivocal facts, that it totally ignored the contemporary documents and deposition testimony which exonerated plaintiffs and that it resolved all doubts against plaintiffs, error in a fraud case. We do not shrink from branding the findings as "manifestly wrong" (Br. Opp. 15), though in a fraud case we need not go so far, for there the government must prove its case by clear, convincing and unequivocal evidence.

2) Defendant first defends the "separate" Thorer & Hollender conspiracy evidence on the ground that it was "necessary to clarify the facts about Basch". Br. Opp. 15. Evidence of alleged participation by the 51% Basch group in a "separate" Thorer & Hollender conspiracy was not "clarification". For example, Koch's letter to Ward of April 13, 1940, respecting Thorer & Hollender (unprinted, attached to Defendant's Ex. 4), which refers to the fact that a stock dividend would make "more difficult the 'unscrambling of the [Thorer & Hollender] egg at such time when the world is again at peace * * * ", scarcely sheds light on plaintiffs participation in a Basch Co. conspiracy. Similarly, evidence that Swedish claimants to the vested Thorer & Hollender shares had consented to a dismissal of their suit with prejudice (Cross-Petition, 15) was aimed to prejudice, not to clarify, plaintiffs' position. Defendant's argument would wash away the entire "separate" conspiracy prohibition. For in every case the "separate" conspiracy evidence would "clarify" the participation of the "separate" conspirators in the other conspiracy.

Next defendant urges that plaintiffs may not object "since it was they who first went into the [Thorer & Hollender] matter," Br. Opp. 16, citing to testimony that plaintiffs were never apprised of Thorer & Hollender matters. Certainly this did not "open up" a vast amount of evidence respecting communications about a "separate" conspiracy between Hollender and his Thorer & Hollender associates. By "opening up" the issue plaintiffs did not waive the fundamental safeguard that there must be a tie-in to the "separate" conspiracy before statements by their alleged co-conspirators were admissible against them. Defendant signally failed to tie-in plaintiffs to the Thorer & Hollender conspiracy. Cf. Cross-Petition 12.

Defendant misleadingly suggests that the trial judge limited his consideration of the "separate" conspiracy evidence to the 1943 and 1947 sales, Br. Opp. 17. The trial court's reference to the Thorer & Hollender conspiracy in the midst of his discussion of the 1939 Basch "conspiracy", R. 81, shows that his consideration of the one was colored by the other.

3) We do not, as defendant suggests, insist that "it was incumbent upon the Government to prove by clear and convincing evidence that they engaged in a *criminal* conspiracy to defraud the United States * * *." Br. Opp. 17.

Defendant expressly pleaded a conspiracy to defraud the United States as a defense to a civil suit. R. 17, 24. He was under a burden to prove the fraud. Allegations of *civil* fraud impose a burden of proof by clear and convincing evidence on the government as upon all others. Cross-Petition 9, 16 at fn. 18. Only proof of fraud could rob plaintiffs' evidence of ownership of its efficacy. Cross-Petition 9 at fn. 8.

The lower court cases on burden of proof under the Act, cited by defendant, Br. Opp. 18, exhibit a mechanical,

unreflecting application of the general rule that a plaintiff has the burden of proof. But this has no application to a party constrained to be a plaintiff in order to recover property summarily seized from him. In no case was the constitutional argument proffered by plaintiffs herein even mentioned.

Defendant points to prize law for the rule he espouses. Br. Opp. 19. But as the Privy Council said with characteristic understatement:

> "Prize law has its own peculiar rules." In re Part Cargo SS Monte Contes, 60 Times L. Rep. 57, 58 (1943).

The rule respecting suspicious "contraband" developed by hard-pressed Britain on the high seas scarcely can serve as the test of the rights of an American to reclaim property summarily seized from him by the government within the United States.

Indisputably, the trial court, *after resolving all doubts* against plaintiffs found the case of fraud "clear". Br. Opp. 19. It found "no doubt" that plaintiffs employed German money, R. 80, despite the irrefutable testimony of the contemporary documents to the contrary to which it never alluded. App. to Cross-Petition ii-v. In his brief in opposition, defendant has studiously omitted to comment on the deposition and documentary testimony upon which his "clear" case founders.

4) Respecting the issue of interest, defendant would distinguish *McGrath* v. *Manufacturers Trust Company*, 338 U.S. 241, on the ground that plaintiffs, being

> "'cloaks', were accountable to the German former owners for interest, if they dissipated the dividends, comingled them with their own funds, or *failed to invest them.*" Br. Opp. 19-20.

Defendant's theory drives him to mounting absurdities. Defendant claimed interest on the dividends received by

plaintiffs without making deductions for the high bracket income taxes paid by them. Yet, these taxes, defendant argues, had to be paid for "a successful cloaking of German ownership". Respondent's Petition, 24. How could the bulk of the dividends necessarily paid as taxes be invested? Did such "necessary" tax payments "dissipate" the "trust" funds? And if defendant's theory is anything but the flimsiest after thought, why did he fail to appeal from the denial of interest from 1939 to December 28, 1948? R. 86, 32. Defendant seeks to graft an exception for "trusts" upon the unqualified prohibition of post-vesting interest in the McGrath case.

Respectfully submitted,

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